Central Law Journal.

ST. LOUIS, MO., JULY 29, 1898.

The case of Pillsbury-Washburn Flour Mills Co. v. Eagle, recently decided by the United States Circuit Court of Appeals, for the Seventh Circuit, well illustrates the tendency of courts to extend the operation of trade-mark law in subservience to principles of justice and equity, and shows that while one may not have a technical trade-mark in a geographical name, there may be circumstances under which a court will practically protect such a claim. It appeared in this case that certain millers in Minneapolis, Minn., and their predecessors in business have for 30 years made flour by the roller patent process, and used as brands the words "Minneapolis," "Minneapolis, Minn.," "Minneapolis, Minnesota," "Minnesota," "Minnesota Patent." The words "Minnesota" or "Minnesota Patent" mean that the flour is made under the roller patent process somewhere in Minnesota. The words "Minneapolis," "Minneapolis, Minn.," "Minneapolis, Minnesota," signify to the trade that the flour was made at a Minneapolis flouring mill. A dealer in Chicago, Ill., obtains from mills at Milwaukee, Wis., an inferior grade of flour, which he labels "Best Minnesota Patent, Minneapolis, Minn.," and advertises as made at Minneapolis, Minn., with the result that the public is deceived into buying this flour under the belief that it is made at Minneapolis, and is defrauded, and the business of the Minneapolis millers is damaged. It was held, reversing the decree of the lower court that a court of equity may grant relief by prohibiting the fraud and preventing damage to the business of the Minneapolis millers. The court in an exhaustive review of the authorities by Judge Bunn decides that where one person has so dressed out his goods as to deceive the public into the belief that they are the goods of another person, and so put them upon the market to the manifest injury of that person and of the public, an action at law will lie for the deceit; and, to save a multiplicity of suits, and prevent irreparable injury, equity will restrain such unfair and fraudulent competition; that while a geographical name is not the subject of a trade-mark, and any one may use it, yet where it has been adopted, first, as merely indicating the place of manufacture, and afterwards has become a well-known sign and synonym for superior excellence, persons residing at other places will not be permitted to use it as a brand or label for similar goods for the purpose of appropriating the good will and business of another; and that where the question is simply one of unfair competition, it is not essential that there should be any exclusive or proprietary right in the words or labels used, as, irrespective of any question of trade-marks, rival manufacturers have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals.

In the recent English case, quite analogous to this, of Saxlehuer v. Appollinaris Co., 13 Times Law Rep. 258, plaintiff was the owner of a spring in Hungary named "Hunyadi Janos." Defendant, once the exclusive agent in England for the sale of the spring water, on expiration of the contract, began selling water from a spring near Budapest, which was styled "Uj Hunyadi." The injunction went, Mr. Justice Kekewich saying, "The plaintiff's case, as thus opened, was brought distinctly within the authority Reddaway v. Banham (1896), App. Cas. 199, which, be it observed, was decided by the house of lords some time before writ issued. It is important to note what that authority really is. There is no novelty in the principle stated, and even the language finds a counterpart in many older cases, such as Seixo v. Provezende, 1 Ch. App. 192; but yet the law is so clearly put on a simple and intelligent basis that one necessarily makes it the starting point in consideration of questions of this class. I have studied the case with this view, and it seems to me the entire doctrine summed up in one sentence in the first paragraph of the lord chancellor's speech moving the judgment of the house, 'Nobody has any right to represent his goods as the goods of somebody else.' Observe that the proposition is perfectly general. There is no limit as regards name, origin, honesty of manufacture or sale, or otherwise; and, although there are elsewhere to be found learned and useful disquisitions on the facts of the particular case, the application of the law to them, and criticism of earlier authorities, there is no departure from

what the lord chancellor states to be 'the principle of the law.' It matters not, therefore, how a plaintiff's goods come to acquire a particular value, or how the defendant's goods have come to adopt that value. If, in fact, the defendant is selling his goods as those of the plaintiff, he is doing what the law will not allow, and the plaintiff is entitled to relief against him." To much the same effect is Newman v. Alvord, 51 N. Y. 189, the trade-mark used by the plaintiff and which the court protected being the word "Akron" in designating a cement made by them near the village of Akron, New York. That case was approved by the Supreme Court of the United States in Canal Co. v. Clark, 13 Wall. 311, and McLean v. Fleming, 96 U. S. 245. In Manuf. Co. v. Gato (Florida), 7 South. Rep. 24, it was held that "when a man manufactures his goods at a particular place, and uses the name of that place in combination with other words as a trade-mark to distinguish the origin or ownership of his goods, no other person will be permitted to use the name of the same place, upon goods manufactured by him at another and different place,"—citing Canal Co. v. Clark, 13 Wall. 325; Congress & Empire Spring Co. v. High Rock Congress Spring Co., 45 N. Y. 291; Newman v. Alvord, 51 N. Y. 189; Manufacturing Co. v. Hall, 61 N. Y. 226; Sawyer v. Horn, 1 Fed. Rep. 24; Gilman v. Hunnewell, 122 Mass. 139; Robertson v. Berry, 50 Md. 591, 33 Am. Rep. 337, note 1. In City of Carlsbad v. Kutnow, 68 Fed. Rep. 794, the city of Carlsbad, as proprietor of the Carlsbad springs, had for years evaporated the waters into salts, which were sold as "Carlsbad Sprudel Salz." Defendants, who were New York druggists, made a similar salt, without the use of the genuine Carlsbad water, and sold it under the name "Improved Effervescent Carlsbad Powder." An injunction was granted. Much to the same effect are Association v. Piza, 24 Fed. Rep. 149, involving the use of the words "St. Louis Lager Beer," as a trade-mark; Lead Co. v. Cary, 25 Fed. Rep. 125; A. F. Pike Mfg. Co. v. Cleveland Stone Co., 35 Fed. Rep. 896; Northcutt v. Turney (Ky.), 41 S. W. Rep. 21.

NOTES OF IMPORTANT DECISIONS.

FIDELITY INSURANCE — CONSTRUCTION OF BOND.—The Supreme Court of the United States has recently in the case of Amer. Surety Co. v. Pauly, 18 Sup. Ct. Rep. 552, laid down the following propositions of law applicable to fidelity insurance and bonds given by such companies:

"1. A provision in a fidelity insurance bond requiring the employer to notify the insurer of any act of the employee which may involve loss, 'as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer,' does not require notice unless the employer has knowledge, and not a mere suspicion, of facts which would justify a careful and prudent man in charging another with fraud or dishonesty.

"2. A provision in a fidelity insurance bond that a written statement of loss, certified by the duly-authorized officer of the employer, and based upon the accounts of the employer, 'shall be *prima facie* evidence thereof,' makes such a statement *prima facie* proof in an action brought on the bond, and does not relate merely to the presentation of the claim to the company, and its acceptance or rejection thereof, before suit.

"3. The 'retirement' of a national bank president from the service of the bank, in the meaning of a bond of fidelity insurance, is not effected by the mere suspension of the bank, and the taking possession thereof by an examiner, and in the absence of some other action, he continues in such service until, at least, a receiver is appointed by the comptroller.

"Mr. Justice White, Mr. Justice Shiras, and Mr. Justice Peckham dissented."

RELEASE OF JOINT TORT-FEASOR. — The Supreme Court of Kansas holds in Missouri, K. & T. Ry. Co. v. McWherter, that the rule that a settlement by and discharge of one of two or more joint wrongdoers operates as a discharge of both has no application unless both are guilty of the wrongful act. A settlement with and discharge of one not in fact guilty will not affect the liability of the wrongdoer. The following is from the opinion of the court:

"The next contention is that a settlement with one of two joint wrongdoers is a discharge of both; that in this case the bridge company and the railroad company were engaged in the joint enterprise which resulted in McWherter's death; that, a settlement having been made with the bridge company, the railroad company also is discharged. We shall assume, without expressing any opinion as to the correctness of the assumption, that the plaintiff, as administratrix, would be barred by any settlement made by the widow that would bar an action brought by her. The soundness of the general rule that a settlement with one of two joint tort-feasors ordinarily discharges both is recognized. Westbrook v. Mize, 35 Kan. 299, 10 Pac. Rep. 881. In Leddy

v. Barney, 139 Mass. 394, 2 N. E. Rep. 107, it was held that a release by A given to C is a bar to an action against B for the same cause, whether C was liable or not; that the mere fact of making the claim against C, coupled with the satisfaction of it, was sufficient to release all who might be liable; and this view is supported by Seither v. Traction Co. (Pa. Sup.), 17 Atl. Rep. 338, and Tompkins v. Railroad Co., 66 Cal. 163, 4 Pac. Rep. 1165. On the other hand, in the case of Turner v. Hitchcock, 20 Iowa, 310, it was held that 'a release of a person who is not in fact liable to the releasor does not destroy the right of action of such releasor against those who are liable.' To the same effect are the cases of Bloss v. Plymale, 3 W. Va. 393; Wilson v. Reed, 3 Johns. 174; Wardell v. McConnell, 25 Neb. 558, 41 N. W. Rep. 548; Snow v. Chandler, 10 N. H. 92; Bell v. Perry, 43 Iowa, 368; Owen v. Brockschmidt, 54 Mo. 285; Pogel v. Meilke, 60 Wis. 248, 18 N. W. Rep. 927. In the case of Bridge Co. v. Hall, 125 Ind. 220, 25 N. E. Rep. 219, it was held: 'The execution of a release by the plaintiff to the railroad corporation which employed him would not act as a release of the bridge corporation sued, if from the evidence the jury might conclude that the corporation to which the release was executed was in no way responsible for the accident.' We concur in the view taken by the authorities last cited. The reason of the rule which renders the acceptance of satisfaction from one of two or more joint tort-feasors a discharge as to all is that the wrong is single and entire, and the injured party is entitled to one, and only one, satisfaction, no matter how many parties may have joined in the act. As a general rule, the nature of the case does not admit of an apportionment of the damages among the wrongdoers, but they are liable jointly and severally for the whole. When the wrongful act is not done jointly by the persons from whom compensation is sought, but is the deed of one or the other, and not of both, we are unable to perceive on what principle a settlement with and discharge of one affects the cause of action against the other. Certainly, it is not by way of estoppel, for the party not released is no party or privy to the arrangement, and has no joint interest with the one discharged. In this case there was ample evidence to show that the neglect was that of the railroad company alone, and the release executed by Mrs. McWherter expressly stipulates that it shall not operate as a discharge of the railroad company. Conceding that the claim made against the bridge company was unjust and ill founded, we know of no legal principle on which it can be made available to the railroad company. The claim that the dismissal of the case brought by Mrs. McWherter against the company determines the controversy, and constitutes a bar to this action, is expressly negatived by the terms of the order itself, which shows that 'the court dismissed said action without prejudice.'"

FRAUDULENT CONVEYANCE — INSURANCE — RIGHT TO PROCEEDS.—The Court of Appeals of Colorado decides in Forrester v. Gill that money due for loss under an insurance policy is not the proceeds of the property destroyed, and therefore cannot be followed as a fund for creditors who have been defrauded by a transfer of such property by their debtor to the insured; that payment by the husband of the premium on a policy of insurance in favor of his wife, covering her interest in property fraudulently transferred by him to her, does not subject money due on a loss thereunder to the claims of his creditors, and that as between the husband's creditors and the assignee of a claim for loss payable to his wife on a policy of insurance covering property alleged to have been fraudulently transferred by him to his wife, it is immaterial whether the assignee paid a consideration for such claim. The court says:

"Insurance is a contract of indemnity. The insurer agrees, for a consideration, to pay to the insured a stipulated amount in case the latter shall sustain loss or damage in consequence of the happening of some event or contingency contemplated by the contract. It is a personal contract, and does not run with the title to the property. Cummings v. Insurance Co., 55 N. H. 457; May, Ins. §§ 1, 6. The money which the insurance company agreed to pay to Mrs. Craft was not payable as a price for the property, and its payment would not operate to convert the property into a fund. It was her personal interest in the property which was insured, and the agreement was to pay to her personally a certain amount in case of injury to her interest from a specified cause. That she had an insurable interest is conceded, and, even if it were not conceded, is settled by the adjudications. The fund which the plaintiff seeks to reach does not in any sense represent the property. Therefore it cannot be taken for the husband's debt, as the property itself might have been. The fact that the transaction by which her interest was created might have been avoided by her husband's creditors gives them no claim to money payable to her as compensation for the destruction of that interest, upon a contract which she had the right to make, which in no manner affected the interest of her husband, and in consequence of which no injury could result to those creditors. Lerow v. Wilmarth, 9 Allen, 382; Bernheim v. Beer, 56 Miss. 149; McLean v. Hess, 106 Ind. 555, 7 N. E. Rep. 567; Nippes' Appeal, 75 Pa. St. 472. In McLean v. Hess the court said: 'The insurance was taken in plaintiff's name. However fraudulent the purpose was in having the property conveyed to her, that policy belonged to her. However fraudulent the conveyance to plaintiff may have been, she had an insurable interest in the property. The insurance was taken in her name; the policy was hers; and the proceeds thereof cannot be taken from her by the husband's creditors.' The case of Shoe Co. v. Ladd, to which we are referred, is not in point. Ladd was in-

sured upon a stock of goods against loss by fire. By an indorsement on the policy, the loss was made payable to James A. Lovejoy, a mortgagee of the goods, as his interest might appear. The property was destroyed by fire. It was held that a creditor of Ladd could garnish the insurance money, and attack the mortgage as fraudulent. But the policy belonged to Ladd. The loss was payable to him, less such interest as Lovejoy might have under his mortgage, and, if he had no interest, the whole belonged to Ladd. The creditor had the right to show that, as to him, Lovejoy had no interest, and that, therefore, the entire fund was within the reach of his process, as belonging to Ladd. See Carpenter v. Insurance Co., 16 Pet. 495.

"Nor is the situation altered by the fact, if it was a fact, that the premium was paid by the husband. The insurance money does not represent the premium. The premium is not part of it. The premium was the consideration for the agreement of the company to pay the money, but the money represents the loss she sustained after the premium was paid, and nothing else."

CRIMINAL LAW—TRIAL—PRISONER IN MANACLES.—The Supreme Court of Appeals of West Virginia holds in State v. Allen, 30 S. E. Rep. 209, that while the practice of keeping a prisoner manacled when on trial before a jury has always been held in disfavor in England, and also in this country, yet the trial court has a discretionary power therein, but a power which should not be exercised under ordinary circumstances, or in any case where the prisoner is not violent and obstreperous, or escape be threatened; and such restraint should not be imposed except in cases of immediate necessity, and that when the record is silent as to whether there was or was not any valid excuse for retaining the irons upon the prisoner during trial, the appellate court will presume that the court below exercised a sound and reasonable discretion in not causing them to be removed.

ANNULLING MARRIAGE FOR FRAUD.

"Jove laughs at lovers' perjuries," ran the classic maxim. It is also true of justice, and properly so, for if it were not, the dissolution of the marriage bond would be even more common than it unhappily is in this country. A large latitude is indulged in parties contemplating marriage, concerning their recommendations of themselves, just as there is in trade concerning puffery of goods. Such barterers invariably put the best foot forward and turn the best side out, and neither of the parties to such a bargain was ever known to heed the solemn injunction of the priest at the altar to confess impediments if they know any. Love makes one blind, not only to the faults of the beloved, but to his own. In short, "not to put too fine a point upon it," as Cousin Fenix was accustomed to say, marriage is a lottery—few prizes and many blanks. The only remedy for unhappiness in the relation is philosophy, as practiced by Socrates or Mrs. Carlyle. The fraud which will avoid a marriage must go to the essence of the contract. *Caveat emptor*, the rule of trade, seems to apply. So fraudulent representations by one party as to birth, age, social position, fortune, health, manners or character, will not suffice. "The law makes no provision for a blind credulity, however it may have been produced."[1] So a marriage may not be avoided on account of the false and fraudulent representations of the woman that she was chaste before marriage;[2] nor even when she had given birth to an illegitimate child.[3] The impolicy of any different rule was set forth very forcibly by Ruffin, J.: "Concealment is not a fraud in such a case—disclosure is not looked for—active misrepresentations and studied and effectual contrivances to deceive, are at least to be required, to give it that character; and the other party must appear not to have been voluntarily blind, but to have been the victim of a deception which would have beguiled a person of ordinary prudence. I know not how far the principle contended for would extend. If it embrace a case of pregnancy, it will next claim that of incontinence; it will be said the husband was well acquainted with the female and never suspected her, and has been deceived; then, that he was a stranger to her, smitten at first sight, and drawn on a sudden into a marriage with a prostitute; that he was young and inexperienced, hurried on by impetuous passion, or that he was in his dotage and advantage taken of the lusts of his imagination, which were stronger than his understanding. From uncleanness it may descend to the minor faults of temper, idleness, skittishness, extravagance, coldness, or even fortune inadequate to representations, or perhaps to expectations. There is in gen-

[1] 2 Kent Com., 77; Wakefield v. Mackey, 1 Phill. 137 (cited by Bishop, but apparently a miscitation); Klein v. Wolfsohn, 1 Abb. N. C. 134.

[2] Varney v. Varney, 52 Wis. 120, 38 Am. Rep. 726.

[3] Smith v. Smith, 8 Oreg. 100.

eral no safe rule but this: that persons who[4] marry agree to take each other as they are." In short, "for better or worse" relates backward as well as forward. So far have the Massachusetts court carried this doctrine that they have conceded that a man may not refuse, in the absence of fraud, to fulfill his contract to marry a woman simply because she is part negro, although they hold that if she falsifies about her family color, he is excused.[5] The court observed further: "It is not to be supposed that every error or mistake into which one may fall concerning the character or qualities of a wife or husband, although occasioned by disagreement or even false practices or statements, will afford sufficient reason for annulling an executed contract of marriage. Therefore no misconceptions as to the character, fortune, health or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, where once executed, can be obtained in a court of justice. Bigelow, Ch. J., Reynolds v. Reynolds, 3 Allen, 605." The question whether concealed pregnancy, by another than the husband, at the time of the marriage, is such fraud as will suffice to avoid the marriage, has been considerably discussed. In Alabama, Georgia, Iowa, Kansas, Kentucky, Maryland, Mississippi, Missouri, North Carolina, Tennessee, Virginia, West Virginia, Wyoming and Oklahoma, it has been deemed worth while to enact statutes providing for a divorce on the petition of the aggrieved husband in such cases. The leading case is in Massachusetts.[6] There the court observed: "The material distinction between such case and a misrepresentation as to the previous chastity of a woman is obvious and palpable. The latter relates only to her conduct and character prior to the contract, while the former touches directly her actual present condition and her fitness to execute the marriage contract and take on herself the duties of a chaste and faithful wife. * * * The concealment and false statement go directly to the essentials of the marriage contract and operate as a fraud of the gravest character on him with whom she enters into that relation." "This fraud exists both because a child may be born which according to the presumption of law will be the husband's, though not really his, and because the woman at the time of the marriage is incapable of bearing a child to her husband." "A man therefore who has contracted a marriage with a woman under such circumstances, if he could not obtain a divorce on the ground of fraud, would be subjected to the painful alternative of disowning the child, and thereby publishing to the world the shame of her who was still to remain his wife, or suffer the presumption of legitimacy to stand, and admit the child of another to share in his bounty and receive support in like manner as his own legitimate children. There is no sound rule of law or consideration of policy which requires that a marriage procured by false statements or representations and attended with such results upon an innocent party should be held valid and binding on him. * * * It is not to be overlooked, in the consideration of the question whether antenuptial pregnancy should constitute a sufficient ground of divorce, where it is unknown and kept concealed from the husband, and the marriage is contracted on the faith that the woman is chaste and virtuous, that the existence of the fact cannot be ascertained before marriage by any of the ordinary means of personal intercourse, or by careful and diligent inquiry." The same holding is found in California[7] where the question was elaborately discussed by Field, J., and the ground adopted was that the woman in that condition could not, by reason of her own fault, at the time of the marriage, bear children to her husband. So in New Jersey,[8] in the court of errors and appeals, two judges dissenting. She cannot "take on herself the duties of a chaste and faithful wife," said the court, quoting from the Reynolds case. Here although the child was born two months and a half after marriage, the husband was blameless and was deceived by artifice of dress and conduct. So in Indiana,[9] at a time when divorce could be granted in the discretion of the court, for reasonable and proper cause, in a case where the husband discovered the wife's condition the next night after the wedding and immediately left her. In Pennsylvania[10] the doctrine has been recognized, but a dis-

[4] Scroggins v. Scroggins, 3 Dev. L. 535.
[5] Van Houton v. Morse, 162 Mass. 414, 40 Am. St. Rep. 373.
[6] Reynolds v. Reynolds, 3 Allen, 605.
[7] Baker v. Baker, 13 Cal. 87.
[8] Carris v. Carris, 24 N. J. Eq. 516.
[9] Ritter v. Ritter, 5 Blackford, 81.
[10] Allen's Appeal, 99 Pa. St. 196, 24 Am. Rep. 101.

puted state of facts was left to the jury. The child was born seven months after marriage, "so there could have been nothing in her appearance at that time to indicate her condition." The same doctrine was adopted in Michigan,[11] in a case where a marriage in haste was repented at leisure. The parties met on August 8th, married in three days, in February he went away, and in his absence she had a mature child, which the wife assured the husband was very small at its "premature" birth, but "it was wonderful how it got developed in two weeks' time." The court made short work of the affair. The same doctrine is recognized in Texas.[12] Express representations of previous chastity are not necessary.[13] Mr. Bishop brusquely observes: "For the majority of men, about to marry, do not call witnesses and put to the beloved the question,—'Are you pregnant?'" The doctrine is denied in California,[14] in a case where the man knew the woman to be pregnant, but she falsely assured him she had been as cold toward everybody else as "the icicle that hangs on Diana's temple." The court also held that such pregnancy was not "incapacity." The same doctrine is declared in England.[15] Counsel cited the Massachusetts decisions to the contrary. The court, in a very learned opinion and after a careful examination of the American cases, quite unusual in a British court, and some compliments to Mr. Bishop, "the learned and eminent text-writer," observed: "Speaking with all respect, these courts have, in my opinion, introduced a novelty into the law common to the two countries, and have broken in on the principle that the only fraud which annuls a marriage is that which renders the mind of one of the parties not a truly consenting mind. They repudiate equally with English tribunals the idea that any other fraudulent representation vitiates a marriage." "The departure, as I venture respectfully to think, from the law of England, consists not only in unduly extending the analogy between the law of marriage and the law of other contracts, but more especially in declaring a circumstance to be of the essence of marriage which the English law does not so hold," *i. e.*, burdening the husband with the child of another and the inability at once to bear a child to the husband. "The law of Massachusetts appears to me to add another—not indeed the want of chastity in the wife; but such want of chastity as result in pregnancy at the time of the marriage." The judge agrees with Mr. Bishop in opinion, and proceeds: "It appears to me impossible to say that it is immaterial that a wife has been unchaste and immaterial that she has become pregnant by that unchastity, but it is material if such pregnancy continues till the marriage." "But that is assuredly not the law of England, and unless there is to be one law for a man and another for a woman, it is impossible to suppose there ever could be." But there is just that difference in England, evidenced by the fact that the husband can have a divorce for adultery of the wife, but the wife cannot have a divorce for mere adultery of the husband. The law of this country on both branches seems to us to be placed on a much higher and nobler plane of morality. Mr. Schouler deals with the matter rather ingeniously by observing "that the woman who brings surreptitiously to the marriage bed the incumbrance of some outside illicit connection, introduces a disqualification to the union as real as the physical impotence of the man would be, resulting from his own lasciviousness."[16] Not quite so real, I apprehend, for the woman's physical disqualification is temporary and the man's permanent.

In some courts the doctrine of contributory negligence is applied. As where the wife was pregnant at the time of the marriage, and five months afterwards gave birth to a mulatto, it was held that the husband was without remedy because he ought to have recognized the situation.[17] This was in spite of the pathos in the petition that the "occurrence admitted of neither explanation or palliation, and dissipated all hopes of happiness." Ruffin, J., found time to write a very rhetorical opinion. There was then no statute authorizing divorce for fraud. The same court, however, granted a divorce where the woman represented that a child to which she had given birth before marriage, and which proved to be a mulatto,

[11] Harrison v. Harrison, 94 Mich. 559, 34 Am. St. Rep. 364.
[12] McCulloch v. McCulloch, 69 Tex. 682, 5 Am. St. Rep. 96.
[13] Donovan v. Donovan, 9 Allen, 140.
[14] Franke v. Franke (Cal.), 18 L. R. A. 375.
[15] Moss v. Moss (1897), Prob. 263.
[16] Dom. Rel.
[17] Scroggins v. Scroggins, 3 Dev. L. 535.

was the plaintiff's, either because the color was so indistinct as to mislead a man of ordinary intelligence, or she had concealed the child from his view.[18] Ruffin, J., hesitatingly conceded so much "to the deep-rooted prejudices of the community upon this subject." This reminds one of Virgil's "*Ne Nimium crede colori.*" But where the color was not objectionable, the same court, in 1877, denied relief where the marriage was on January 22d, and the birth on July 29th, but the plaintiff discovered the fact and left the defendant on March 8th.[19] One judge dissented. The color line was also drawn in New York,[20] where the woman charged the defendant in bastardy, the child having been born, and he recognizing his liability married her, and the baby proved to be a mulatto, and the court granted the relief. Chancellor Walworth roguishly observed that he was "not such a convert to the theory of Dr. Mitchell in Whistelo's Case, 3 Wheel. Cr. Cas. 194, as to believe it possible she did not intend to commit a fraud," etc. Contributory negligence was also influential in two Massachusetts cases, where the husband had had intercourse with the woman beforehand, in the first of which he knew of her pregnancy, but she assured him the child was his,[21] and in the second she assured him she was not pregnant.[22] The court was tender toward the plaintiff in an Ohio case.[23] The complainant was "a simple, honest fellow" of twenty-eight, "but little used to female society," and the defendant was a Quakeress of thirty-five. The child was born in less than a month after the marriage. The ceremony (of marriage) took place in the dusk without lights, "under circumstances as to the position and movement of the bride," said the court, "with an arrangement of the full Quaker dress of the ladies, which excited the suspicion of the clergyman. The husband and wife lived together without his suspicions being awakened, until the wife was taken in labor pains, and presented her wondering spouse a full grown child before the expiration of the honeymoon." (That bride seems to have been arrayed in an appropriate color.) The court made a present of the child to the mother. In Vermont,[24] it has been held that a divorce should be granted on account of the wife's concealed infection with incurable syphilis at the time of the marriage, and in a very extraordinary New York case,[25] it was held that the marriage might be annulled on account of the constant and incurable flow of the wife's menses, which condition she concealed. In my manual on Domestic Relations, I pronounced this "bad law," and so it is, on the theory of fraud, but perhaps it may be upheld on the ground of impotency. In Pennsylvania,[26] it has been held that false representations of pregnancy made by a woman to a man with whom she had had illicit intercourse, to induce him to marry her, are not such fraud as warrants setting aside the marriage. In another case,[27] where the complainant believed the woman to be a widow and the mother of a legitimate child, whereas she had never been married, and the child was illegitimate, the divorce was denied. The court said that "if all the facts falsely stated in the bill were admitted to be true, they afford no ground for divorce from the bond of matrimony, unless we apply to the solemn contract of marriage the same rules that we do to a contract for swapping horses." This seems to be *obiter*, however, for it was found as a fact that the husband knew before the marriage that the child was illegitimate, and it appeared that he "took up his residence with a prostitute near the navy yard," in order to obtain a residence, and this was what induced the court to "regret that a suit based upon charges so ridiculous, impudent and false, can be visited by this court with nothing more than the judgment we here pronounce." A very interesting group of recent New York cases next claims attention. In one,[28] an orphan girl of twenty had made careful inquiries through her brother and her "pastor" as to the character of the suitor. He attended church and played the role of "a law-abiding citizen of good character," but it turned out that he had been secretly keeping a pool room (an occupation punishable by fine and im-

[18] Barden v. Barden, 3 Dev. L 548.
[19] Long v. Long, 77 N. Car. 304, 24 Am. Rep. 449.
[20] Scott v. Shufeldt, 5 Paige, 43. See Barth v. Barth (N. Y.), 5 Monthly Law Bull. 87.
[21] Foss v. Foss, 12 Allen, 27.
[22] Crehore v. Crehore, 97 Mass. 330.
[23] Morris v. Morris, Wright, 630.
[24] Ryder v. Ryder, 66 Vt. 558, 44 Am. St. Rep. 832.
[25] Meyer v. Meyer, 49 How. Pr. 311.
[26] Todd v. Todd, 149 Pa. St. 60, 17 L. R. A. 320.
[27] Farr v. Farr, 2 McArthur (Dist. Colo.), 35.
[28] King v. Brewer, 8 Misc. Rep. 587.

prisonment), and an annulment was granted. The court ground their decision on the pregnancy cases, and a case in 6 Miscellaneous, and speak of the "progress from a somewhat puritanical view" in the Scroggin's case. In the other case relied on,[29] a young woman was relieved from her husband because he proved to be a "professional criminal whose picture was in the rogues' gallery." These last two decisions were both in the superior court, and seem to have been inspired by gallantry. In the last the court said: "Such a husband is not a fit subject for the household, nor one to be looked up to for advice and guidance." What the same court would have decided if the defendant had been the wife, who had been a prostitute, and whose bleached hair had figured in advertisements of nostrums, does not appear, but we can guess that no such leniency would have been shown. On the other hand, it was held that concealment by the wife of the fact that she had given birth, before marriage, to an illegitimate child, is not such fraud as warrants annulment of the marriage.[30] In Iowa, a divorce was denied to a widow, with a child nine years old, who had incautiously married a "jail bird."[31] And relief was denied to a man who had married a woman who had procured a valid divorce from a former husband, whereas he supposed her a maid,[32] the court disapproving King v. Brewer. In another New York case,[33] a school girl of fifteen was induced to marry without her parents' consent by the false statement that they knew of the defendant's intention, and did not object, and that she need not live with him for three or four years, and the marriage was not consummated. The marriage was annulled on the ground that the fraud went to the very essence of the contract. Another example was where a marriage was procured through the pretended intervention of denizens of the spirit world, working on the weak mind of an infirm old man;[34] and still another "where complainant, who was a man of about seventy-five, and who had lost his eyesight, and was more or less deaf, and otherwise broken, was induced suddenly, and by putting him under the influence of liquors, and probably of drugs, to marry defendant, who was less than half his age, and had a young child, and for whom he had never entertained any attachment, and with whom he was very slightly acquainted. He had just become assured that he would receive a liberal pension, and $10,000 and upwards of arrears, and the motive for the conspiracy is manifest."[35] In a recent case, the unpleasant fact that the wife turned out to be a kleptomaniac, was held insufficient to warrant annulment.[36] Said the court: "The parties must take the burden of informing themselves, by acquaintance and satisfactory inquiry, before entering into a contract of the first importance to themselves and to society in general." So of occasional paroxysms and hereditary insanity.[37] And so of a previous insanity.[38] Enough has been said to illustrate the position of our courts on this very interesting subject. The right and prevalent rule seems to be that fraud will not suffice to warrant annulment, unless it goes to the very essence of the contract, but that it is of the essence that the wife should, at the time of the marriage, be in a position to afford the husband his just marital rights, and not in a position to subject him to the burden of maintaining offspring not his own. The mere matter of chastity is not of the essence, in the eye of the law, in the case of the woman any more than in the case of the man. The spasm of the New York Superior Court, excited by the plight of incautious and badly advised young women, is not likely to infect the frame of other and more unemotional courts.

IRVING BROWNE.

Buffalo, N. Y.

[29] Keyes v. Keyes, 6 Misc. Rep. 355.
[30] Shrady v. Logan, 17 Misc. Rep. 329.
[31] Wier v. Still, 31 Iowa, 107.
[32] Fisk v. Fisk, 6 App. Div. 433, citing Clarke v. Clarke, 11 Abb. Pr. 228.
[33] Moot v. Moot, 37 Hun, 288.
[34] Hides v. Hides, 65 How. Pr. 17.
[35] Gillett v. Gillett, 78 Mich. 184.
[36] Lewis v. Lewis, 44 Minn. 124, 20 Am. St. Rep. 559, 9 L. R. A. 505.
[37] Hamaker v. Hamaker, 18 Ill. 137, 65 Am. Dec. 705.
[38] Cummington v. Belchertown, 149 Mass. 223, 4 L. R. A. 131.

DISQUALIFICATION OF JUDGE FOR INTEREST—TAXPAYER.

MEYER v. CITY OF SAN DIEGO.

Supreme Court of California, May 31, 1898.

In an action against a city to set aside, as illegal and void, its contract for waterworks, and to enjoin the issuance of bonds therefor, where it appeared that the issuance of the bonds would necessitate a special

tax for 40 years, and directly affect the value of all realty subject to it, the trial judge is disqualified, by virtue of his owning land in such city and paying taxes thereon, since he is "interested" in the action, within Code Civ. Proc. § 170.

HENSHAW, J.: The plaintiff instituted an action against the city of San Diego, and against the Southern California Mountain Water Company, for the twofold purpose (1) of setting aside as illegal and void a contract between the city and the water company defendant, involving an expenditure of $1,500,000 of the moneys of the city to be obtained by the sale of its bonds; and (2) to enjoin the issuance and sale of the bonds to carry out the contract.

The bond issue had been voted at a special election called under an ordinance submitting to the electors the proposition of incurring a bonded debt of $1,500,000 "for the acquisition by said city, for the use of said city and of its inhabitants, of and from the Southern California Mountain Water Company, of a water right, reservoir sites, a meter-house site, and rights of way, and for the construction by said city of waterworks for the use of said city and its inhabitants." The controlling acts under which the election was held and the bonds voted are the statutes relating to the issuance of municipal bonds for public improvements. St. 1889, p. 399; St. 1891, p. 132; and St. 1893, p. 61. These acts prescribe, not only the mode by which such indebtedness may be incurred, but ordain as well the limit of indebtedness, the character of the bonds, the rate of interest, and the place of payment. They also enjoin upon the municipal authorities the duty of levying and collecting a special annual tax sufficient to pay interest, and provide a sinking fund for the ultimate redemption of the bonds.

Plaintiff is a taxpayer of the city. Other taxpayers were allowed to intervene in the cause. The San Diego Water Company had instituted a similar suit against these defendants, and the actions were consolidated.

Before the trial there was presented a motion for a change of venue, upon the ground of the disqualification of Judge Torrance, in whose department the action was pending. Grounds identical with those urged as disqualifying Judge Torrance were asserted to exist in the case of the other judges of the superior court of the county. The affidavits used at the hearing show that the judge was the owner of real property situated and taxed in the city of San Diego for municipal purposes, and taxable for the payment of a bonded indebtedness such as that the validity of which is a question in the case. It also was made to appear that the issuance of the bonds in controversy and the carrying out of the contract between the city and the defendant water company would necessitate a special tax for 40 years, and directly affect the value of all real property subject to it. Upon the other hand, a determination that the contract and proceedings were illegal would result in a decree enjoining the issuance of the bonds, and relieve all property within the municipality from the burden of the bond-redemption tax. The trial judge concluded that he was not disqualified, refused to grant the motion, and retained the action. From this ruling and order the San Diego Water Company and certain interveners prosecute their appeals.

By section 170 of the Code of Civil Procedure it is provided that no justice, judge, or justice of the peace shall sit or act in any action or proceeding to which he is a party or in which he is interested. This is but an expression of the ancient maxim that no man ought to be a judge in his own cause, —a maxim which appeals so strongly to the sense of justice that it is said by Lord Coke to be a natural right, so inflexible that an act of parliament seeking to subvert it would be declared void. Co. Litt. § 212. It is a principle which finds expression in the constitutions of many of our States, which declare the right of a citizen to be tried by judges as free and impartial as the lot of humanity will permit. It is a principle whose strict observance is dictated both by natural justice and an enlightened public policy; for it is not enough that a judicial decision be sound. It is of next importance that the tribunal rendering it be free from the charge of interest or the taint of partiality, else public confidence will be destroyed and judicial usefulness gravely impaired.

But what is the "interest" which will disqualify? for it is manifest that just bounds must be set to the meaning of the word, since, if a judge be not disqualified, it is as much his duty to retain the action as it is to remove it when the recusation is well founded. Heinlen v. Heilbron, 97 Cal. 101, 31 Pac. Rep. 838.

In the oft-quoted case of Hesketh v. Braddock, 3 Burrows, 1856, the interest imputed to the jurors, and to the officer who returned them, rested upon the fact that they were members of the municipal corporation which was seeking to recover a penalty due. The whole penalty was but five pounds, yet the proceeding was quashed by the court of king's bench, Lord Mansfield saying: "The law has so watchful an eye to the pure and unbiased administration of justice that it will never trust the passions of mankind in the decisions of any matter of right. * * * There is no principle in the law more settled than this: that any degree, even the smallest degree, of interest in the question depending, is a decisive objection to a witness, and much more so to a juror, or to the officer by whom the juror is returned. If, therefore, the sheriff, a juror, or a witness be in any sort interested in the matter to be tried, the law considers him as under an influence which may warp his integrity or pervert his judgment, and therefore will not trust him. The minuteness of the interest won't relax the objection, for the degrees cannot be measured. No line can be drawn but that of a total exclusion of all degrees whatsoever." But this, it should be noted, is rather a declaration of the principle than a definition of the disqualifying interest; and while in terms this

case does not include the judge as coming within the principle of disqualification, it is not to be doubted that it applies with equal strength, and with more reason, to such an officer. Dimes v. Canal Co., 16 Eng. Law & Eq. 63. The disability of a witness to testify because of interest induced great hardship and led to many absurdities. Thus, one was not debarred from being a witness if it was determined that his interest was equally balanced, nor was the heir apparent to an estate incompetent to testify in support of the claim of his ancestor, though his expectation of inheriting might be immediate and well-nigh certain. Again, the interest of a parent in a child, or of the child in the parent, was not a disqualifying interest, but only such as to affect the credibility of the witness. The injustice and hardship of the rule as to witnesses soon became so apparent that by statute it was entirely abrogated, and now no interest disqualifies a witness, its sole effect being to impair his credit.

In the case of jurors, however, who are judges of the fact, and of the magistrates, judges, and justices who are judges of the law, and frequently both of the law and facts, there has been far less relaxation of the principle; and this, if for no other reason, because the courts themselves, in their desire to preserve the administration of justice free from the taint of unfairness, have inclined to a strict enforcement of the principle, and also because there are well-defined limits to the power of the legislature, should it ever seek to overthrow so salutary a rule. Thus, in North Bloomfield Min. Co. v. Keyser, 58 Cal. 315, this court, citing section 170 of the Code of Civil Procedure, declares that the provision should not receive a technical or strict construction, but rather one that is broad and liberal; and quotes with approval the language of the Supreme Court of Michigan in Stockwell v. Board, 22 Mich. 350, to the following effect: "The court ought not to be astute to discover refined and subtle distinctions to save a case from the operation of the maxim when the principle embodied bespeaks the propriety of its application. The immediate rights of the litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance." And in Heilbron v. Campbell, 23 Pac. Rep. 122, it is said again by this court: "It should be the duty and desire of every judge to avoid the very appearance of bias, prejudice, or partiality, and to this end he should decline to sit * * * in any case in which his interest in the subject-matter of the action is such as would naturally influence him either one way or the other.

Upon the latter proposition, that of the power of the legislature to modify or abrogate the rule, statutes have been passed, and upheld by the courts which remove the disqualification of jurors and of judges who are merely corporators of a municipal corporation and taxpayers therein, which corporation is a party interested. These statutes have been countenanced by the courts upon the ground that the interest of the juror or judge is so remote, trifling, and insignificant that it may fairly be supposed to be incapable of affecting the judgment or of influencing the conduct of the individual. These statutes, it is to be remembered, however, are in derogation of the common-law rule, and it will always be a judicial question, as to any particular statute, whether or not, by its terms or in its effect, it violates this fundamental principle of judicial decision. Thus, Judge Cooley: "But, except in cases resting upon such reasons, we do not see how the legislature can have any power to abolish a maxim which is among the fundamentals of judicial authority. The people of the State when framing their constitution may possibly establish so great an anomaly, if they see fit; but, if the legislature is intrusted with apportioning and providing for the exercise of the judicial power, we cannot understand it to be authorized, in the execution of this trust, to do that which has never been recognized as being within the province of the judicial authority." Cooley, Const. Lim. (6th Ed.), p. 508. The only other exception to the operation of the maxim is that which arises in the nature of the government of the State, and has its existence in absolute necessity. Thus, to illustrate, where the legality of a bonded indebtedness of the State comes before its tribunals, they must act, or the right remain forever without the possibility of its remedy. In such cases, however, the judges are as fair and impartial as the lot of humanity doth permit, and trial before such is all that the constitution, or Lord Coke's *jus naturæ*, can preserve to any man.

It has been pointed out that in most of the States the common-law rule disqualifying a juror for interest by reason of the fact that he is a corporator of the city or town which is a party to the suit has been changed by statute, and that these statutes have been upheld by the courts upon the ground of the remoteness and contingency of the interest. In our own State, section 602 of the Code of Civil Procedure declares the grounds upon which challenges for cause may be taken; and subdivision 5 provides, as a ground of challenge, "interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation." Nothing herein expressly removes the disqualification of the judge, which, alike with that of the juror, existed at common law. But, if the interest of a juror so situated is too remote to disqualify him as a trior of fact, equally, it may be argued, would a like interest be insufficient to disqualify a judge; and thus, without express statutory enactment upon the question, the conduct of judges in trying actions, where the sole ground of their disqualification is the fact that they are corporators and taxpayers of the municipal corporation which is a party thereto, has always been countenanced and upheld. Yet here it may be remarked that

the State is not without some statutory enactments upon the question. Many may be found conferring upon municipal courts and the judges therein jurisdiction of petty offenses for the violation of ordinances and for the collection of revenues under such ordinances. It has never been, and at this day may not be, seriously questioned that a judge of such municipal court is not disqualified by reason of interest merely because of the fact that he is a member and taxpayer of the municipal corporation, either in civil cases where its ordinances are under consideration, or in criminal cases where the penalties, fines and forfeitures for the violation of such ordinances accrue to the municipal treasury.

In a very great number of the cases which have come under review in the consideration of this question, nearly all have to do with the interest of the judge or juror as a member of such public corporation, and in these, where the ancient rule has not been modified by statute, that rule is for the most part observed in all its strictness. Of these cases there may be cited as instructive upon the question: State v. Stuart, 23 Me. 112; State v. Woodward, 34 Me. 293; Com. v. Ryan, 5 Mass. 90; Pearce v. Atwood, 13 Mass. 324; Trustees v. Bailey, 10 Fla. 213; Moses v. Julian, 45 N. H. 52; Inhabitants of North Hampton v. Smith, 11 Metc. (Mass.) 390; Foreman v. Town of Mariana, 43 Ark. 324; Peck v. Freeholders of Essex, 21 N. J. Law, 656; Sauls v. Freeman, 24 Fla. 209, 4 South. Rep. 525; Com. v. Reed, 1 Gray, 472; Ellis v. Smith, 42 Ala. 349; Fine v. Public Schools, 30 Mo. 166; Stockwell v. Board, 22 Mich. 341; Fiske v. Paine (R. I.), 28 Atl. Rep. 1026; Dimes v. Canal Co., 16 Eng. Law & Eq. 63; Oakley v. Aspinwall, 3 N. Y. 547.

In Inhabitants of North Hampton v. Smith, 11 Metc. (Mass.) 390, Chief Justice Shaw, with his usual clearness, has defined this disqualifying interest. He says: "(1) We think it is not to be a mere possible, contingent interest, not an interest in the question or general subject to which the matter requiring adjudication relates, but one that is visible, demonstrable and capable of precise proof. * * * It must, therefore, depend upon facts capable of being precisely averred and proved, and thus put in issue and tried. (2) It must be a pecuniary or proprietary interest—a relation by which, as debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings—in contradistinction to an interest of feeling or sympathy or bias, which would disqualify a juror. (It may be here remarked, to prevent misunderstanding, that, by an amendment to section 170 of the Code of Civil Procedure, bias or prejudice upon the part of the judge is now made a ground of disqualification, and a reason for the removal of a cause.) (3) It must be certain, and not merely possible or contingent. It must be direct and personal, though such a personal interest may result from a relation which the judge holds, as the member of a town, parish or other corporation, where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings."

Thus, the interest which one has in a public question, merely because he is a member of the civic body to be affected by the question, is not the interest which the law has in mind. In the case from which we have just quoted, the judge in probate was not held to be disqualified because in a will before him there was a bequest of money to trustees to be devoted to the use and benefit of indigent persons in certain towns, of one of which the judge was an inhabitant. So, in Foreman v. Town of Mariana, *supra*, the judge, who was an inhabitant of the town, was not for that reason held to be disqualified to sit in and determine upon proceedings for the annexation of territory to the town, although an election had been called to pass upon the question of annexation, and the judge had voted thereat. And so, in Sauls v. Freeman, 24 Fla. 209, 4 South. Rep. 525, the fact that the circuit judge, with other registered voters of the county, had signed a petition addressed to the county commissioners, asking for a change of the county site, did not disqualify him for interest from sitting in a *mandamus* proceeding to compel the commissioners to call an election upon the question. In these and like cases the so-called "interest" of the judge is found to be remote, doubtful and speculative, in no way certain in fact, nor susceptible of precise measurement.

But, upon the other hand, where, in any litigation, there is any certain, definable, pecuniary, or proprietary interest or relation which will be directly affected by the judgment that may be rendered, in every such case, without exception, so far as an exhaustive examination of the authorities goes, the disqualification of the judge is held to exist. Has the judge any pecuniary or personal right or privilege directly affected by or immediately dependent upon the result of the case? As that question is answered, so is answered the question of his disqualification for the interest which we have been considering. In Heilbron v. Campbell, 23 Pac. Rep. 122, the action was between divers claimants to a tract of land to which the judge himself asserted title. The judge was not a party to the suit, nor would the judgment rendered be binding between him and the other litigants. Yet this court *en banc* held the interest to be disqualifying, and properly so; for though generally speaking, an interest in the legal question, as distinguished from a pecuniary interest in the result of the case, is no valid ground of disqualification, there is to this the well-settled exception that where the judge has a lawsuit pending or impending with another person, which rests upon a like state of facts, or upon the same point of law as that pending before him, this is a valid ground of recusation. Davis v. Allen, 11 Pick. 466; Moses v. Julian, 45 N. H. 52.

In Mining Co. v. Keyser, 58 Cal. 315, the action was by the city of Marysville to restrain the mining company from prosecuting its hydraulic work,

because the effect of its mining operations was to injure the lands of the corporation. The judge owned land, not within the municipality, but similarly situated, and equally affected by the mining operations complained of. In an action for an injunction by the city against the mining company, it was held that the judge had such a direct and immediate interest in the result of the action as to disqualify him.

Even more immediate and direct is the interest of the judge in the case at bar than that which appeared in the North Bloomfield Min. Co. Case. The disqualification does not spring from the fact that the judge is a citizen, inhabitant and taxpayer of the city of San Diego, nor yet from the fact that the municipality is a party litigant in the action. It arises from the circumstance that he owns property within the city which may or may not be liable for the burden of a special tax for the period of 40 years, as he shall decide. The validity of this tax is directly called in question. The judge himself, under the circumstances shown, could have instituted as plaintiff this identical action. "The rule is well settled that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others." Story, Eq. Pl. §§ 97, 98; 1 Freem. Judgm. § 178; Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. Rep. 308; Gamble v. City of San Diego, 79 Fed. Rep. 487. He would have been entitled to intervene as well as those who in fact have intervened. The judgment which he renders in the case will be binding upon his rights and his property. His interest is in the outcome of the litigation, and it is a direct, measurable, pecuniary interest.

The distinction between this case and that of City of Oakland v. Oakland Water Front Co., 18 Cal. 249, 50 Pac. Rep. 268, is readily to be observed. Here, as has been said and shown, the judge is to decide directly whether or not property which he owns shall be made subject to the burden of a special tax. In the Oakland Water Front Case the city sought to recover lands which had been granted to it by the State under certain trusts. Even if the city succeeded, it was at least doubtful whether the control of these lands would result in profit or loss to its finances. It was still more doubtful whether their management would affect the tax rate of the city in the slightest degree. The judge had no other interest in the litigation than that which he possessed in common with other taxpayers, and which arose from the fact that he was an inhabitant and taxpayer of the city. It was not a direct, measurable, or pecuniary interest in the litigation or its outcome. The interest was remote, contingent and speculative. It might thus be fairly stated: "If the city recovered the property, and if it successfully managed or sold it, the result might be to lessen the rate of taxation, and thus, under all these contingencies, to reduce in some slight, indeterminate and undeterminable extent the tax rate upon the judge's property. Clearly, such a remote and contingent interest is readily to be distinguished from that in the case at bar, where the judge, in a cause directly involving the legality of a tax imposed and to be imposed upon his land, does by his *ipse dixit* declare whether the burden shall remain or be removed.

In City of Austin v. Nalle, 85 Tex. 520, 22 S. W. Rep. 668, 960, the question of the interest of the judge under circumstances identical with those of the case at bar was presented, and the court reached the conclusion here declared. The same principle was invoked and the same ruling made in Wetzel v. State, 5 Tex. Civ. App. 17, 23 S. W. Rep. 825, and again in State v. City of Cisco (Tex. Civ. App.), 33 S. W. Rep. 244.

It is urged that the case of Wade v. Travis Co., 72 Fed. Rep. 985, is authority against this position. This is in a measure true. It was an action in the Circuit Court of the Western Division of Texas, and the question of the disqualification of a federal judge by reason of his pecuniary interest, under facts similar to those here presented, was considered by the court. Its decision upon the proposition is in the following language: "Authorities examined by the court leave the question in some doubt, and, for the purpose of having it definitely determined by an appellate tribunal, we have concluded to hold that that disqualification on the part of the district judge does not exist, and we suggest to counsel the propriety of preserving proper exceptions in order that the point may be conclusively settled by the court of appeals." It may be conceded that so far as it goes this case is against the conclusion which we have reached; but it should be said in this connection that it is the only case of its kind, and, as appears from the language of the learned judge, he decided as he did only in order that the question might be definitively laid at rest by the appellate tribunal.

As it is uncontradicted in this record that the same disqualification which existed in the case of Judge Torrance existed as to the other judges of the superior court of the county, it follows from what has been said that the motion for change of venue should have been granted. The order is therefore reversed.

NOTE.—Two of the judges dissent from the conclusion of the court in the principal case upon the ground that the case is not distinguishable in principle from that decided in the City of Oakland v. Oakland Water Front Co., 118 Cal. 249, 50 Pac. Rep. 268, where it was held that the trial judge was not disqualified. The following are some very recent cases on the subject of disqualification of judge of courts for interest. A judge is not disqualified to try a nuisance case because he was a member of the city council when it dealt with the same controversy. Waters Pierce Oil Co. v. Cook (Tex. Civ. App.), 26 S. W. Rep. 96. An action in which defendants' property was attached does not involve the validity of an assignment for benefit of creditors made before the attachment was levied, where neither the assignee, nor any person claiming under the assignment, is a party to the action; and therefore a special judge before whom the cause is brought for trial is not disqualified because he drew

the assignment, advised the assignee, and was a creditor of defendants, and had accepted under the assignment. Kemp v. Wharton County Bank (Tex. Civ. App.), 4 Tex. Civ. App. 648, 23 S. W. Rep. 916. Where, in trespass to try title, the judge in whose court the cause is pending has possession of the land in controversy, claiming title thereto, he is "interested," within Const. art. 5, sec. 11, providing that "no judge shall sit in any case wherein he may be interested," and is disqualified to try the cause, and the failure of plaintiff, through ignorance, to make him a party, does not change the rule. Casey v. Kinsey, 5 Tex. Civ. App. 3, 23 S. W. Rep. 818. A judge who owns property subject to a city tax which is sought to be collected is disqualified to render a judgment enjoining the collection thereof. Wetsel v. State (Tex. Civ. App.), 5 Tex. Civ. App. 17, 23 S. W. Rep. 825. The fact that the judge has a suit pending against the plaintiff, a corporation, in an action on trial before him, is insufficient to disqualify him on account of interest, where the two actions are entirely independent, and the judgment in the one case will in no way affect the judgment in the other. Southern California Motor Road Co. v. San Bernardino Nat. Bank, 100 Cal. 316, 34 Pac. Rep. 711. A judge who is a director of a national bank cannot try a case to which it is a party, since, by Rev. St. U. S. sec. 5146, he must necessarily be interested as a stockholder. Williams v. City Nat. Bank (Tex. Civ. App.), 27 S. W. Rep. 147. A justice of the peace is not disqualified, by reason of interest, to try a person on the complaint of a grand juror for criminal libel, though the justice was the person libeled. Clyma v. Kennedy, 64 Conn. 310, 29 Atl. Rep. 539. A district judge is not disqualified from presiding on a trial for a criminal offense by the fact that he was district attorney when it was committed, where it appears that he had nothing to do with the prosecution of the case, either in examining the witnesses, or preparing the complaint or indictment, and that he resigned his position before the indictment was presented. Utzman v. State (Tex. Cr. App.), 32 Tex. Cr. Rep. 426, 24 S. W. Rep. 412. A judge who, previous to his commission, was an attorney of record in a suit in which an execution issued, is disqualified to try a claim interposed to property levied on under such execution. State v. Hocker (Fla.), 15 South. Rep. 581. A judge who, before his commission, was a partner of the firm which began suit, using the name of such firm, is disqualified from trying a claim to property levied on in an execution in such case, though the suit may have been managed by the other member of the firm. State v. Hocker (Fla.), 15 South. Rep. 581. Code Civ. Proc. sec. 547, providing that a judge shall not sit in a case in which he was attorney for either party, does not preclude a judge from trying an action for the removal of an administratrix of an estate, for whom he had acted as attorney in the execution of her trust. State v. Woody (Mont.), 36 Pac. Rep. 1043. A judge is not disqualified for hearing a petition for the issue of railroad aid bonds by the fact that his name appears as a subscriber for one share of stock of the railroad; his subscription having been canceled, and no stock delivered. Town of Andes v. Ely, 158 U. S. 312, 15 S. C. Rep. 954. The fact that a judge was surety on the bond of a temporary administrator does not disqualify him to pass on the acts of such person as regular administrator. Halbert v. Martin (Tex. Civ. App.), 30 S. W. Rep. 388. A judge who, under a power of attorney attaches a name of a surety to the bond of a county treasurer, is disqualified to approve a bond as required by Code 1887, sec. 812. Stuart v. Commonwealth (Va.), 21 S. E. Rep. 246. A judge is not disqualified from hearing a case because his brother, who is attorney for one of the parties, has a contingent interest in the result. Winston v. Masterson (Tex. Civ. App.), 27 S. W. Rep. 691. The prosecuting attorney is not a party to a criminal case, within How. St. §§ 6822, 7245, prohibiting a judge or justice of the peace from hearing any case when they are related to either party. People v. Whitney (Mich.), 63 N. W. Rep. 765. A judge who, by marriage, is a first cousin or cousin-german of a stockholder in a corporation, is not disqualified to hear a case in which the corporation is interested. Robinson v. Southern Pac. Co., 105 Cal. 526, 38 Pac. Rep. 94. Mere casual expressions of opinion by an attorney not engaged in a case, will not disqualify him from sitting as trial judge, on the ground that he had "been counsel in the case." Lee v. Heuman (Tex. Civ. App.), 32 S. W. Rep. 93. A judge is not disqualified to try a case because, prior to his appointment, he was attorney for some of the defendants in relation to matters not connected with the case; but the judge must decide for himself whether it is improper to sit in the case. Carr v. Fife, 156 U. S. 494, 15 Sup. Ct. Rep. 427. A judge is not disqualified to try an action because he had been counsel in a prior action by the same plaintiff in relation to the same land, where he has no interest in the pending action, and none of the questions involved therein were involved in the prior action. Wolfe v. Hines, 93 Ga. 329, 20 S. E. Rep. 322. A judge is not disqualified from hearing a case because his brother is attorney for the plaintiff, his fee being contingent upon a recovery. George Knapp & Co. v. Campbell (Tex. Civ. App.), 36 S. W. Rep. 765. Where suit is brought against the directors of a cemetery association by a shareholder therein for the appointment of a receiver, and for other relief, the fact that the judge before whom the cause is heard is related to a shareholder who is not a party to the suit, does not disqualify him. Houston Cemetery Co. v. Drew (Tex. Civ. App.), 36 S. W. Rep. 802. The judge, not being a lot owner, is not disqualified because some of his relatives are buried in the cemetery. Houston Cemetery Co. v. Drew (Tex. Civ. App.), 36 S. W. Rep. 802. A district judge, who is a resident, citizen and taxpayer of a county, is not disqualified by pecuniary interest from sitting in a case which involves the validity of bonds issued by the county. Wade v. Travis County (U. S. C. C.), 72 Fed. Rep. 985. A judge of the court of civil appeals, who is a taxpayer in a certain city, is not interested in an action against such city for personal injuries caused by its negligence, within the meaning of Const. art. 5, § 11, providing that no judge shall sit in any case in which he may be interested. City of Dallas v. Peacock (Tex. Sup.), 33 S. W. Rep. 220. A judge who owns taxable property in a city, against which proceedings are brought to annul the corporation and remove its officers, is disqualified to try the cause. State v. City of Cisco (Tex. Civ. App.), 33 S. W. Rep. 244. In an action to recover the balance due on the salary of a county official, and praying for citation against the county, the county judge, and other members of the commissioners' court, the county judge, being interested therein to the extent of the costs of making him a party and serving him with citation, is disqualified from determining the action. Collingsworth County v. Myers (Tex. Civ. App.), 35 S W. Rep. 414. Under Const. § 165, disqualifying a judge on account of interest in a cause, there must be a pecuniary or property interest, or one affecting his individual rights, and the liability or pecuniary gain to the judge must occur on the event of the suit. Fer-

guson v. Brown (Miss.), 21 South. Rep. 603. Sayles' Civ. St. art. 1090, disqualifying the judge of the district court to sit where either party is related to him within the third degree, applies, though the person so related to him is a party as administrator only. Dennard v. Jordan (Tex. Civ. App.), 37 S. W. Rep. 876. Under Code Cr. Proc. 1895, art. 606, providing that no judge shall sit in any case where the party injured is connected with him by consanguinity or affinity within the third degree, on trial of an indictment for the malicious killing of a hog with intent to injure the owner, the brother of the owner is disqualified to act as judge. January v. State (Tex. Cr. App.), 38 S. W. Rep. 179. The validity of a judgment appointing a receiver of a corporation is not affected by the fact that the judge is related to some of the stockholders, who are not parties to the suit. *Ex parte* Tinsley (Tex. Cr. App.), 40 S. W. Rep. 306.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACTION—Torts—Use of Another.—Where an action *ex delicto* is brought in the plaintiff's name for the use of another, the named and his rights should be disregarded, but recovery will be allowed upon proof of right by the nominal plaintiff.—JONES v. KANSAS CITY, M. & B. R. CO., Miss., 23 South. Rep. 547.

2. ACCIDENT INSURANCE.—The Pennsylvania act of May 11, 1881, declaring that, in all controversies relating to "life and fire insurance policies," neither the application, constitution, by-laws, nor other rules of the company shall be received in evidence or be considered as part of the contract or policy, unless copies of the same are attached thereto, does not include policies of insurance against bodily accidents.—STANDARD LIFE & ACCIDENT INS. CO. OF DETROIT, MICH., v. CARROLL, U. S. C. C. of App., Third Circuit, 86 Fed. Rep. 567.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS—Partnership Property.—Under the Wyoming assignment law, providing that creditors accepting the benefit of an assignment shall give release in full of their several debts, held, that an assignment, by a partnership, of partnership property alone, to pay firm debts only, is invalid; creditors are entitled to look also to the separate property of the partners.—SWOFFORD BROS. DRY-GOODS CO. v. MILLS, U. S. C. C., D. (Wyo.), 86 Fed. Rep. 556.

4. ASSIGNMENT FOR CREDITORS — Accounting by Assignee.—Where one of the creditors for whose benefit an assignment is made makes a settlement with the assignee on the theory and the representation of the assignee that he has received his share of the assigned estate, an action by him for more is not simply a suit for settlment of the trust estate, on the general doctrine that a receipt in full for a part of a debt is void, which does not apply in such a case, but involves relief from fraud or mistake, so as to be governed by the statute of limitations applicable to such relief.—RICHARDSON v. WHITAKER, Ky., 45 S. W. Rep. 774.

5. ATTACHMENT—Debt not Due.—Under Rev. St. 1895, arts. 188, 189, providing that no attachment shall issue until a suit has been instituted, and that an attachment may issue although the debt be not due, and the same proceedings shall be had thereon, as in other cases, except that no final judgment shall be rendered until the debt shall become due, an attachment suit may be brought on a note before maturity, and judgment taken after its maturity.—RABB v. WHITE, Tex., 45 S. W. Rep. 858.

6. BANKS AND BANKING—Drafts by Agent.—The mere fact that an agent asks for a certificate of deposit in his own name for moneys of his principal is equivalent, nothing to the contrary appearing, to a declaration by the agent that the money is received by him in his individual capacity, for his individual use, and is enough to put the bank on inquiry as to why the agent wanted the certificate so issued, especially where the president of the bank knew the agent to be irregular and unreliable in his business methods.—FARMERS' LOAN & TRUST CO. v. FIDELITY TRUST CO., U. S. C. C. of App., Ninth Circuit, 86 Fed. Rep. 541.

7. BILLS AND NOTES — Conditions Precedent.—A provision in a note, whose only consideration is the construction of a railroad, that the road shall be completed and in operation by a certain day, is a condition precedent to a liability thereon, a failure of which renders the note void.—JORDAN v. NEWTON, Mich., 75 N. W. Rep. 130.

8. BILLS AND NOTES — Liability of Indorser.—At the time of the execution of a note it was agreed orally between the maker, payee, and one D that D should collect money due to him and the maker, and pay it over to the payee. The money was collected, but was not paid, and, after maturity of the note, D, in recognition of his prior agreement, indorsed the note in blank. Held, that D, being morally bound to pay the money over, and, in recognition of his moral obligation, indorsing same, which was an express promise in writing, was liable as a guarantor.—RANKIN v. MATTHIESEN, S. Dak., 75 N. W. Rep. 196.

9. BILLS AND NOTES—Negotiable Note — Guaranty.—An unrestricted guaranty of payment indorsed on a negotiable instrument is negotiable, and passes with the title to the instrument.—COMMERCIAL BANK v. CHESHIRE PROVIDENT INST., Kan., 53 Pac. Rep. 131.

10. CARRIERS—Injury to Passenger — Contributory Negligence.—A shipper of stock in an emigrant car, who rode with it the car in violation of the terms of his

contract, which required him to remain in the caboose while the train was in motion, was not for that reason guilty of negligence preventing his recovery for an injury which resulted from the negligence of defendant's servants in charge of the train while the car was stationary, and while plaintiff was giving proper attention to his stock.—TEXAS & P. RY. CO. v. REEDER, U. S. S. C., 18 S. C. Rep. 705.

11. CARRIERS OF PASSENGERS—Negligence.—Where a passenger was unable to get upon the depot platform because it was narrow and crowded, and was struck and killed by the train, there was evidence for the jury as to the negligence of the company in not providing suitable and safe accommodation for access to its trains.—YOUNG v. NEW YORK, ETC. R. CO., Mass., 50 N. E. Rep. 455.

12. CHATTEL MORTGAGE—Description.—Liquor in a cellar on a different floor from and unconnected with the barroom, from which the bar is supplied, is not within the mortgage of property in the "room or rooms" known as the hotel barroom.—LATTA v. BELL, N. Car., 30 S. E. Rep. 15.

13. CHATTEL MORTGAGE—Notice.—A mortgage of the earnings of a threshing machine in which the machine is described as that owned and possessed by the mortgagor, without giving its number or name of maker, or stating the place where, or the persons against whom, the earnings were to accrue, is insufficient to bind one who pays to the mortgagor a sum due for threshing after actual notice of the claim by the mortgagee; and, in an action by the mortgagee to recover of such person, the mortgage is inadmissible.—MINNEAPOLIS THRESHING MACH. CO. v. SKAU, S. Dak., 76 N. W. Rep. 199.

14. CONSTITUTIONAL QUESTIONS—Penal Statute—Construction.—A penal law must be construed strictly, and according to its letter. Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligibly described in its very words, as well as manifestly intended by the legislature. And where a penal statute contains such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of life or liberty is to be preferred.—EX PARTE BAILEY, Fla., 23 South. Rep. 552.

15. CONTRACTS — Forfeitures—Time the Essence of.—An agreement which provided that, if the one party promptly paid a note to the other party when due, then the latter should assign a certain lease, and, "if said note is not paid," then the latter should retain her lease and all the improvements made on the premises by the former, does not make time the essence of the contract, and there is no forfeiture where the one party paid the note a week after its maturity, and the other party suffered no damage by the delay.—SEATON v. TOHILL, Colo., 53 Pac. Rep. 170.

16. CONTRACT—Joint Contract.—Gen. St. 1894, § 4521, which provides that, where two or more persons are indebted on any joint contract, and either of them die, his estate is liable therefor, is applicable to an action brought in district court against the legal representatives of such estate, to recover an amount alleged to be due on a contingent joint obligation for the payment of money, not absolute and capable of liquidation when the time expires for the presentation of claims to the probate court.—BERRYHILL v. PEABODY, Minn., 75 N. W. Rep. 220.

17. CORPORATION—Bank Directors — Liability.—Directors of a corporation are agents of the corporation and its stockholders, and owe no duty to corporate creditors. They are not, therefore, liable to such creditors, after insolvency of the corporation, for loss made possible by their neglect to properly supervise the management of its affairs.—DEADRICK v. BANK OF COMMERCE, Tenn., 45 S. W. Rep. 786.

18. CORPORATION—Foreign Corporations.—A duly-organized foreign corporation, having all the proper officers, doing business and keeping its books as a corporation, is a *de jure* corporation, and its validity is not affected by Pub. Acts 1893, p. 82, requiring foreign corporations doing business in the State to pay a franchise fee, and making void all contracts of one not doing so.—ROUGH v. BREITUNG, Mich., 75 N. W. Rep. 147.

19. CORPORATIONS—Stock Subscriptions — Misrepresentations.—A stockholder cannot escape liability for his subscription on the ground that false representations were made to him by the promoters of the corporation.—OLDHAM v. MT. STERLING IMP. CO., Ky., 45 S. W. Rep. 779.

20. CORPORATION—Subscription to Corporate Stock—Insolvency of Corporation.—A subscription to stock induced by fraud may be rescinded after, as well as before, the corporation ceases to be a going concern, where no considerable time has elapsed since the subscription, if the subscriber has taken no active part in the management of the corporation's affairs, has been diligent in discovering the fraud and in taking steps to rescind, and where no considerable amount of corporate indebtedness has been created since the subscription, and is still unpaid.—WALLACE v. BACON, U. S. C. C., D. (Cal.), 86 Fed. Rep. 553.

21. COUNTIES—Validity of Contract.—Where a county engages a physician for a stated time, at a stated salary, to perform certain services, and a part of the services it had not the power to engage him to perform, the contract is valid for that part for which it had the power to enter into, and it would be bound to that extent the same as a private individual.—GALVESTON COUNTY v. DUCIE, Tex., 45 S. W. Rep. 798.

22. COURTS — Probate Court — Jurisdiction.—Const. Ala. art. 6, § 9, provides that the general assembly shall have power to establish courts of probate with general jurisdiction to grant letters testamentary and of administration. Held, that under this provision the probate court has exclusive jurisdiction to grant letters testamentary and of administration, and that a court of chancery had no power to grant administration *de bonis non* of an insolvent estate removed from the probate court for final settlement.—EX PARTE LUNSFORD, Ala., 23 South. Rep. 528.

23. CRIMINAL EVIDENCE — Homicide—Confessions.—Detectives, in order to obtain a confession of murder from defendant, pretended to be a band of outlaws, and induced him to assert complicity in the murder and many other crimes, in order to qualify for admission to their ranks. Held, that the confession as to the murder was admissible, in connection with the collateral inducements under which defendant made it.—COMMONWEALTH v. WILSON, Penn., 40 Atl. Rep. 283.

24. CRIMINAL LAW—Larceny—Possession of Stolen Goods.—With testimony before the jury tending to show the accused, charged with larceny, was found in possession of the property recently stolen, and failed to account for that possession, it would be erroneous to charge the general rule that, to convict on circumstantial evidence alone, the evidence must consist with guilt, and exclude any reasonable theory of innocence, without charging also that the law presumes guilt from one circumstance; *i. e.*, the possession of property recently stolen, and no account by the accused for that possession.—STATE v. KELLEY, La., 23 South. Rep. 548.

25. CRIMINAL LAW—Rape—Attempt to Commit.—In order to convict of attempt to commit rape, it must be shown that at the time of the alleged attempt it was the intent of the party to use the same degree and character of force as would make him guilty of rape or of an assault with intent to commit rape, but that in the actual attempt, carried beyond mere preparation, he fell short of such degree of force.—MOON v. STATE, Tex., 45 S. W. Rep. 806.

26. CRIMINAL LAW—Robbery—Felonious Intent.—In a prosecution for robbery, an instruction that, since fear was not charged in the information, the State must prove beyond a reasonable doubt that the crime was committed by force, is not erroneous for failure to

state that a felonious intent is necessary, where robbery has been clearly defined in a previous instruction.—STATE v. RODGERS, Mont., 53 Pac. Rep. 97.

27. CRIMINAL PRACTICE—Adultery—Indictment.—An indictment for adultery sufficiently shows that the woman has a husband living, where it charges, "and the said A being then and there a married woman, and the wife of one J."—NAMES v. STATE, Ind., 50 N. E. Rep. 401.

28. CRIMINAL PRACTICE—Murder—Informations.—An information for murder, which alleges that the killing was done purposely and with premeditated malice, is sufficient, under a statute requiring only that the crime be charged so as to enable a person of common understanding to know what was intended thereby, though it does not allege that the particular acts or instrumentalities of the killing were done with premeditated malice.—STATE v. TOMMY, Wash., 53 Pac. Rep. 157.

29. CRIMINAL PRACTICE — Perjury—Indictment.—An indictment for perjury alleging that the accused did "willfully, knowingly, absolutely and falsely swear in a matter material to the issue and point in question" (setting it forth), and further alleging that this "testimony was false, and (the accused) knew it was false at the time he so swore, and (the accused) did thereby commit willful, intentional and corrupt perjury," sufficiently averred an intention to swear falsely.—KING v. STATE, Ga., 30 S. E. Rep. 30.

30. DEED—Acknowledgments by Married Women.—A deed purporting to convey property of a married woman, with a proper certificate of a notary authorized to take acknowledgments, showing on its face that the acknowledgments of the husband and wife were taken in the manner prescribed by statute, does not convey any title, even to an innocent purchaser for value and without notice, where the wife had in fact never appeared before the notary, nor given her acknowledgment to the deed.—WHEELOCK v. CAVITT, Tex., 45 S. W. Rep. 796.

31. DEED—Meander Lines as Boundaries.—Where a deed describes the land conveyed by metes and bounds and by the meander line of a river, such line is the actual water line, unless the contrary clearly appears from the deed itself.—SIZOR v. CITY OF LOGANSPORT, Ind., 50 N. E. Rep. 377.

32. DEED—Parents to Child—Condition for Support.—Where an aged couple deeded their property to their son in consideration of his agreeing to support them for life, and giving them a mortgage on part of it as security for the agreement, and a mortgage on said part for $2,000, they are not limited to their remedy on the mortgages.—KNUTSON v. BOSTRAK, Wis., 75 N. W. Rep. 156.

33. DIVORCE—Liability of Wife.—Where the allegations and proofs are insufficient to justify it, it is error for the circuit court to subject a divorced wife's property to the payment of the debts of her husband's creditors, by reason of improvements alleged to have been placed thereon with intent to delay, hinder and defraud such creditors.—ADAMS v. IRWIN, W. Va., 30 S. E. Rep. 59.

34. ELECTION—Contest—Ballots.—In a contested election case, where the identical ballots cast are not in court, the court cannot receive parol evidence as to their contents.—OAKES v. FINLAY, Ariz., 53 Pac. Rep. 173.

35. ELECTION CONTEST—Rejected Ballots.—Where, in a contest of the canvass of an election board heard by the court, a string of ballots marked "Rejected ballots" are found on the recount, but are found by the court not to be the same ballots that were voted at the election, oral evidence to show their similarity to those ballots which were rejected is inadmissible to authorize such ballots to be counted for either party.—PUSCH v. BRADY, Ariz., 53 Pac. Rep. 176.

36. EQUITY—Pleading—Prayer in Alternative.—Where the pleader is in doubt as to whether he is entitled to one kind of relief or another upon the facts alleged in a bill in equity, he may frame the prayer in the alternative, so that, if he is not entitled to the one, he may obtain the other. If, in such case, upon the allegations of the bill, the complainant is entitled to either kind of relief prayed, the defendant cannot demur because he is not entitled to the other; the remedy being to insist at the hearing that complainant be confined to such relief only as he is entitled to under all the circumstances of the case as then presented.—FLORIDA SOUTHERN R. CO. v. HILL, Fla., 23 South. Rep. 566.

37. EVIDENCE—Parol Evidence—Shipment of Freight.—In the absence of fraud or mistake, evidence of oral communications between the parties to a written contract, which were had prior to the execution of the written contract, is not admissible.—BURGHER v. CHICAGO, R. I. & P. R. CO., Iowa, 75 N. W. Rep. 192.

38. EXECUTION—Growing Crops—Interest of Landlord.—Where land is leased and rent reserved in kind or share of the crops to be raised, the landlord and tenant are tenants or owners in common of the growing crops on such land during the life of the lease, and the interest of either party is a leviable one.—SIMS v. JONES, Neb., 75 N. W. Rep. 150.

39. EXECUTION—Removal of Property.—The recording of a judgment in the county where rendered, which makes it a lien on all defendant's property in such county (Code 1886, p. 635, note), gives such creditor a right to levy on property which defendant in execution had afterwards sold the claimant, who had removed it to another county.—STREET v. DUNCAN, Ala., 23 South. Rep. 528.

40. EXECUTION SALE—Rights of Purchaser.—An unrecorded transfer of corporate stock as collateral security is valid as against a purchaser of the stock at an execution sale, with notice of such transfer.—MAY v. THOMAN, Mich., 75 N. W. Rep. 129.

41. FEDERAL COURTS—Diverse Citizenship—Partnership Associations.—A "partnership association, limited," or organized under Act June 2, 1874, which is governed by a board of managers, with liability of members limited to the amount of their unpaid capital stock, power to sue and be sued, and to hold and convey real estate, in its associated name, is a corporation and a citizen of Pennsylvania, within the meaning of the statutes of the United States requiring diversity of citizenship to give federal jurisdiction, though the assignee of the interest of a member in the capital stock cannot participate in the affairs of the company unless elected to membership therein by a majority of its members.—ANDREWS BROS. CO. v. YOUNGSTOWN COKE CO., U. S. C. C. of App., Sixth Circuit, 86 Fed. Rep. 585.

42. FOREIGN JUDGMENTS.—A judgment of a court in Maine appointing a guardian for a person by it adjudged a lunatic is evidence of his lunacy in a suit brought in Texas by a stranger, involving the lunatic's title to land, since the mental condition of the party was the thing primarily determined by the judgment, and the appointment of the guardian was only the incident.—HERNDON v. VICK, Tex., 45 S. W. Rep. 852.

43. FRAUDULENT CONVEYANCES—Action to Set Aside.—Neither the grantor nor his assignee of the purchase money secured therein can maintain a suit to set aside a deed as made with intent to delay, hinder, and defraud the creditors of the grantee or others.—BILLINGSLEY v. MENEAR, W. Va., 30 S. E. Rep. 61.

44. FRAUDULENT CONVEYANCE — Gift to Wife.—A husband may make a donation to his wife or return her a loan of money received, augmented by profits, if he retain an amount of tangible property largely more than sufficient to pay all his just indebtedness.—HUME & WARWICK CO. v. CONDON, W. Va., 30 S. E. Rep. 56.

45. FRAUDULENT CONVEYANCE—Suit to Set Aside.—In a suit to set aside a conveyance made when the grantor was insolvent, his insolvent condition is sufficiently set forth in the complaint by allegations that at the time of the transfer, and also when suit was brought, defendant had not property subject to execution suffi-

cient to pay plaintiff's judgment.—VANSICKLE v. SHENK, Ind., 50 N. E. Rep. 381.

46. GARNISHMENT — Municipal Agent.—Garnishment will not lie against one holding, as agent for a city, money due a municipal commission appointed in its behalf, but will for money held as agent for the commission.—ROSSELL v. BARTRAM, Del., 40 Atl. Rep. 242.

47. HIGHWAYS—Dedication—Prescription.—To establish a highway by prescription, there must be a continuous user by the public under a claim of right, distinctly manifested by some appropriate action on the part of the public authorities, for a period equal to that required to bar an action for the recovery of title to land.—LEWIS v. CITY OF LINCOLN, Neb., 75 N. W. Rep. 154.

48. HOMESTEAD—Exemptions — Mechanic's Lien.—A homestead is exempt from sale for a mechanic's lien.—MORGAN v. BEUTHEIN, S. Dak., 75 N. W. Rep. 204.

49. HUSBAND AND WIFE — Curtesy—Estoppel.—A conveyance of land made in 1849 directly from husband to wife was void at law, but operated to convey an equitable estate to the wife, the legal title remaining in the husband, together with the right of curtesy, unless a contrary intent appeared; and therefore a husband occupying property so conveyed, after the death of the wife, holds as tenant for life, and not adversely.—BALL v. BALL, R. I., 40 Atl. Rep. 234.

50. HUSBAND AND WIFE — Right of Dower.—Where a husband makes a contract to convey land, in which the wife does not join, and pending a suit for specific performance both join in a conveyance to a third person, who, before a decree ordering a conveyance under the contract, reconveys to the husband, the wife has no interest in the property as against the vendee, her right of dower having been released by her deed, and she having acquired no interest in the title obtained by her husband on the reconveyance as against the vendee.—SHARTS v. HOLLOWAY, Ind., 50 N. E. Rep. 386.

51. HUSBAND AND WIFE—Separate Estoppel—Retaining Benefits.—Plaintiff, wife of defendant, entering into an agreement of separation with him, agreed to release her interest in his property, and join in a conveyance of his realty. Held, that she could not affirm the contract and retain benefits, and yet maintain an action for damages for fraud in its execution.—SCHMOLTZ v. SCHMOLTZ, Mich., 75 N. W. Rep. 135.

52. INJUNCTION — Railroad Right of Way.—A railroad company claiming adverse right and title to a right of way lawfully in the possession of a rival company by virtue of condemnatory proceedings, cannot enjoin the latter company from proceeding to construct its road until just compensation is paid to the former company. But the disputed right and title must first be settled at law.—KANAWHA, ETC. R. CO. v. GLEN, W. Va., 30 S. E. Rep. 86.

53. INJUNCTION — Restraining Trespass.—To warrant the interference of a court of equity to restrain a trespass, two conditions must co-exist: First, the plaintiff's title must be undisputed or established by legal adjudication; and, second, the injury complained of must be irreparable in its nature.—BURNS v. MEARNS, W. Va., 30 S. E. Rep. 112.

54. INJUNCTION — Restraining Order—Mandatory in Effect.—Where the respondent, under claim of right, enters by force upon property in the possession and management of complainant, and drives him away, and assumes control of the same, an order restraining the respondent from interfering with complainant's management and control of such property will not be modified, though in its practical operation it is mandatory, and necessitates affirmative action on the part of the respondent in surrendering the possession he had thus attained.—POKEGAMA SUGAR-PINE LUMBER CO. v. KLAMATH RIVER LUMBER & IMPROVE. CO., U. S. C. C., N. D. (Cal.), 86 Fed. Rep. 528.

55. INJUNCTION — Restraining Order—Violation.—A restraining order must be obeyed in its entirety until modified; and in a proceeding to punish respondents for its violation, the plea that they were acting under the advice of counsel, honestly given, may serve to mitigate the punishment for a violation, but is no defense.—POKEGAMA SUGAR-PINE LUMBER CO. v. KLAMATH RIVER LUMBER & IMPROVE. CO., U. S. C. C., N. D. (Cal.), 86 Fed. Rep. 538.

56. JUDGMENT—Entry.—A court has no authority to enter a judgment *nunc pro tunc* on oral testimony alone, and without some memorandum as evidence of the action of the court to be entered.—BOYD v. SCHOTT, Ind., 50 N. E. Rep. 379.

57. JUDGMENT—Fraud—Mistake.—Equity will not vacate a judgment on account of an innocent mistake, or want of recollection, on the part of the plaintiff or his witnesses, nor, generally, on account of the perjury of other witnesses in the case.—MUNROE v. CALLAHAN, Neb., 75 N. W. Rep. 151.

58. LANDLORD AND TENANT — Attornment.—In an action to recover the possession of land occupied by a tenant who had attorned to plaintiff, it is a good defense that plaintiff's title had been afterwards cut off by reason of his failure to include, as a party to his foreclosure proceedings, a second mortgagee, who had thereafter properly foreclosed, and to whom the tenant had attorned on demand for possession.—WALKER v. FISHER, Mich., 75 N. W. Rep. 144.

59. LANDLORD AND TENANT — Duty to Repair—Negligence.—A breach of a landlord's duty to repair, created by his contract, cannot be availed of, by one not a party thereto, as a basis for recovery for injuries resulting from a defective condition of the building.—WILCOX v. HINES, Tenn., 45 S. W. Rep. 781.

60. LANDLORD AND TENANT — Gas Lease.—A lease of the privilege of withdrawing natural gas from the soil, reserving annual rentals during its continuance, is a leasehold interest, and unaccrued rents passed by a conveyance of the land.—CHANDLER v. PITTSBURGH PLATE GLASS CO., Ind., 50 N. E. Rep. 400.

61. LIBEL — Privileged Communications.—A written message addressed to the city council by the mayor, announcing his veto of a bill passed by the council with his reasons therefor, is an absolutely privileged communication.—TREBILCOCK v. ANDERSON, Mich., 75 N. W. Rep. 129.

62. LIFE INSURANCE—Beneficiaries.—A life insurance policy provided that the insurance should be paid to the wife of the assured if living at the time of his death, otherwise "to their children for their use." Held, that the children of the assured took a vested interest in the policy at the time of its delivery upon the condition subsequent that the mother should predecease the assured, and that upon the happening of this event the heirs of such children as had died prior to the death of the mother would take the shares their parents would have taken had they survived the mother.—GLENN v. BURNS, Tenn., 45 S. W. Rep. 784.

63. LIMITATIONS—Title Acquired.—A wife inherited a portion of real estate upon which she and her husband resided. The wife died childless, leaving the husband surviving, who married again, and died, leaving a widow. The heirs of the first wife brought suit for her interest within 20 years after her death. Held that, as no limitations ran against the wife, her heirs, becoming tenants in common with the husband, were not barred by the statute.—CARSON v. CARSON, N. Car., 30 S. E. Rep 4.

64. LIMITATION OF ACTIONS.—The proviso in Rev. St. Ind. 1894, § 2597 (Rev. St. 1881, § 2442), permitting suits to be brought against heirs, devisees, and distributees of a decedent within two years after final settlement, by any creditor out of the State, does not prevent a federal court from applying the bar of laches resulting from delay within the statutory time.—CONTINENTAL NAT. BANK v. HEILMAN, U. S. C. C. of App., Seventh Circuit, 86 Fed. Rep. 514.

65. MARRIAGE — Annulment—Division of Property.—In an action wherein the marriage between two parties is found to be void because one of the parties had

a husband or wife living at the time of the invalid marriage, and a decree of nullity is entered, the court, while it cannot grant alimony as such, has authority to make an equitable division of property jointly accumulated by the parties while they lived together as husband and wife.—WERNER v. WERNER, Kan., 53 Pac. Rep. 127.

66. MARRIAGE—Breach of Promise — Damages.—In a charge respecting the assessment of punitive or exemplary damages in such a case the question of defendant's motives and intentions, whether good or bad, when entering into the engagement or when breaking it off, should be so submitted that no doubt could exist in the minds of the jury as to the law upon the subject. And the jury should also be instructed that punitive or exemplary damages may be awarded in case improper motives exist on defendant's part, when making the engagement, if the jurors, in the exercise of a sound discretion, believe the plaintiff entitled thereto.—TAMKE v. VANGSNESS, Minn., 75 N. W. Rep. 217.

67. MASTER AND SERVANT—Contracts of Employment.—An employer entered into a contract with a third person continuing 5 years, and at his option, on the giving of notice, for 10 years. He afterwards agreed in writing to employ plaintiff, or, if the employment ceased, to pay him a royalty on certain manufactures for the "full term" of the first contract. No notice was given, and said contract expired in 5 years. Held, that the "full term" of the first contract was 10 years, for which period the employee's contract therefore remained in force.—POOLE v. MASSACHUSETTS MOHAIR PLUSH CO., Mass., 50 N. E. Rep. 451.

68. MASTER AND SERVANT—Instructing Employee.—A master's duty to instruct an employee ignorant of the dangers cannot be delegated so that failure to give them shall be the negligence of a fellow-servant.—SMITH v. HILLSIDE COAL & IRON CO., Pa., 40 Atl. Rep. 267.

69. MASTER AND SERVANT—Mine Owner—Negligence.—It is the duty of an operator or agent of a coal mine to employ a competent mine boss under and according to the provisions of section 11, p. 995, Code 1891, Append., and, having done so, he has discharged his duty to his employees in relation to those duties which the statute prescribes shall be performed by such mine boss, and the operator or agent is not liable for injuries arising from the negligence of the mine boss.—WILLIAMS v. THACKER COAL & COKE CO., W. Va., 30 S. E. Rep. 107.

70. MASTER AND SERVANT—Negligence of Superintendent.—An employer is responsible for injuries to one of his workmen who is injured by the negligent act of the superintendent, which act was done in the capacity of an employee, but in accordance with a faulty method adopted by him as superintendent.—O'BRIEN v. LOOK, Mass., 50 N. E. Rep. 458.

71. MECHANICS' LIENS—Statement — Verification.—Under Code 1896, § 2727, providing that a person claiming a mechanic's lien shall file a statement in writing verified by "oath of the claimant or some other person having knowledge of the facts, containing a just and true account," etc., a verification on knowledge and belief is insufficient to create a lien, and such defect is not cured by proof that affiant did have personal knowledge of the facts.—LONG v. POCAHONTAS COAL CO., Ala., 23 South. Rep. 526.

72. MINES AND MINING — Mining Claims.—There can be no right of possession to a mining claim which is not based on a valid location.—HAMILTON v. HUSON, Mont., 53 Pac. Rep. 101.

73. MINORS — Duty of Court.—It is the duty of a court of equity to see that the interests of minors are protected in suits before it, whether the claim or defense be properly pleaded or not, and for this purpose the chancellor should look to the record in all its parts, and of his own motion give to the minors the benefit of all objections and exceptions appearing thereon, as if specially pleaded, or require the representative of such minors to take such exceptions or file such pleadings as may be necessary to fully secure and protect such rights and interests, as the minors appear by the record to have.—WALKER v. REDDING, Fla., 23 South. Rep. 565.

74. MORTGAGE—Evidence of Debt—Bond.—A bond given a mortgagee on the same day the mortgage was given, and not signed by the mortgagor, although given to secure the same debt, is no part of the mortgage, and those who signed the bond are not necessary parties in an action to foreclose the mortgage.—O'CONNOR v. NADEL, Ala., 23 South. Rep. 532.

75. MORTGAGES — Foreclosure.—Plaintiff took a bond for deed on land subject to a mortgage, which was afterwards foreclosed, the land being sold to a purchaser without notice. Plaintiff was present at the foreclosure sale, but gave no notice of his interest. The land was afterwards sold to two successive purchasers, the last of whom plaintiff notified of his claim. Held, that plaintiff's equitable right to a conveyance was extinguished by the foreclosure.—LA FLEUR v. CHACE, Mass., 50 N. E. Rep. 456.

76. MORTGAGE—Subrogation.—As a general rule, one having an interest in or lien on property, who pays off for his protection a prior incumbrance upon it, is entitled in equity to be subrogated to all the rights of the prior incumbrancer, and to enforce the security for his reimbursement out of the incumbered estate. This equitable right, however, will not prevail against intervening *bona fide* purchasers without notice, or those occupying a like position, nor does it belong to a mere stranger or volunteer who pays the incumbrance.—AMICK v. WOODWORTH, Ohio, 50 N. E. Rep 437.

77. MUNICIPAL CORPORATIONS — Illegal Acts—Injunction.—Courts of equity have jurisdiction to restrain municipal corporations and their officers from making unauthorized appropriations, or otherwise illegally or wrongfully disposing of the corporate funds, to the injury of property holders and taxpayers in the corporation, and a bill for this purpose is properly brought by an individual taxpayer on behalf of himself and other taxpayers in the municipality.—CHAMBERLAIN v. CITY OF TAMPA, Fla., 23 South. Rep. 572.

78. MUNICIPAL CORPORATION — Obligations—Means of Payment.—Where there is no special fund for payment of a municipal obligation, a resort to taxation is implied; hence the power of a municipal corporation to contract is limited by the purposes for which taxes may be levied.—SUTHERLAND-INNES CO. v. VILLAGE OF EVART, U. S. C. C. of App., Sixth Circuit, 86 Fed. Rep. 597.

79. MUNICIPAL CORPORATIONS — Officer De Jure.—Where a person who is not and cannot be an officer *de jure*, because there is not and cannot be an office *de jure* to be filled by any one, usurps the functions and performs acts required by law to be done by officers who exist at the time, *de jure* as well as *de facto*, such law has not been complied with, and the acts cannot be held valid.—STATE v. DISTRICT COURT OF RAMSEY COUNTY, Minn., 75 N. W. Rep. 224.

80. MUNICIPAL CORPORATIONS — Sidewalks — Negligence.—Where a person received an injury by slipping on a loose brick, which was part of an old sidewalk, and was on a level and completely surrounded by other bricks, and there were no bricks out of the walk, there was no apparent defect which the city, in the exercise of reasonable care, could have discovered, and it was not liable.—BUCHER v. CITY OF SOUTH BEND, Ind., 50 N. E. Rep. 412.

81. MUNICIPAL CORPORATIONS—Trolley Poles in Street—An abutting owner, though owning the fee of the street subject to the public easement, cannot complain of the erection and maintenance of electric street railway poles in the street in front of his premises if they were properly placed; this not being an additional burden.—SNYDER v. FT. MADISON ST. RY. CO., Iowa, 75 N. W. Rep. 179.

82. MUNICIPAL CORPORATIONS — Vacating Streets.—The location of union depots and the closing and vacation of streets in cities are within legislative control; and where a city of the first-class, in pursuance of legislative authority, provided for the location of a union depot over a public street, and at the same time closed and vacated that portion of the street upon which the union depot was to be constructed, stipulating and requiring that the union depot company should purchase a strip of ground a few feet away, and dedicate it as a public street, as a substitute for the one closed and vacated, and the company then proceeded to perform the conditions and to erect the union depot in accordance with the authority conferred and the requirements made, the union depot so erected upon and over the vacated street cannot be regarded as a nuisance, subject to be enjoined or abated at the suit of an owner of property situate in the vicinity of such union depot.—CITY OF LEAVENWORTH v. DOUGLASS, Kan., 53 Pac. Rep. 123.

83. MUNICIPAL IMPROVEMENTS — Paving. — A power conferred by statute upon a city "to pave again any street on which the pavements are worn out and useless" necessarily carries with it the power to repave only portions of the street where the pavements on such portions are worn out and useless.—BUECKHARDT v. CITY OF ATLANTA, Ga., 30 S. E. Rep. 32.

84. NATIONAL BANK — Stock of Insolvent National Bank—Liability for Assessment.—Defendant acquired stock of a national bank through his agents, in whose names the shares were registered on the books of the bank, and so appeared when the bank became insolvent. Defendant had all the time held the certificates, so indorsed that he might have had the shares registered in his own name. Held, that the receiver can recover from defendant an assessment on said stock for the benefit of creditors, though he might have proceeded against those in whose names the shares appeared on the bank's stock register.—HUBBELL v. HOUGHTON, U. S. C. C., D. (Mass.), 86 Fed. Rep. 547.

85. NEGLIGENCE.—Where a window and catch of defendant's were in perfect condition, and the window could not fall if the catch were properly set, the fall of the window upon plaintiff's hand, he being rightfully there, must have resulted from the failure of defendant's servant to set the catch, and a presumption of negligence arises from the happening of the accident itself.—CARROLL v. CHICAGO, B. & N. R. CO., Wis., 75 N. W. Rep. 176.

86. NEW TRIAL AS TO PART OF DEFENDANTS.—A new trial may be granted as to one or more of several joint trespassers, against whom a joint verdict has been returned, and judgment be left standing against the others for the full amount of the verdict.—LOVING v. COMMONWEALTH, Ky., 45 S. W. Rep. 773.

87. OFFICE AND OFFICERS—State Senator—Vacating Office.—The president *pro tempore* of the State senate does not cease to be a senator when he becomes lieutenant governor by reason of a vacancy in the office of governor, and a corresponding vacancy in the office of lieutenant governor.—STATE v. STEARNS, Minn., 75 N. W. Rep. 210.

88. PLEADING — Declaration — Joinder of Counts.—Plaintiff may in one count declare on a contract, and seek to recover for breach thereon, and in another count set up an arbitration and award for the same matter.—RAWLINSON v. SHAW, Mich., 75 N. W. Rep. 138.

89. PROHIBITION — Assumption of Authority. — The writ of prohibition is not granted *ex debito justitiæ*, but rests in the sound discretion of the court. Its proper function is to confine inferior courts, in the exercise of their powers, within the limits fixed by law, and is never allowed to usurp the office of a writ of error, or an appeal. A distinction exists between the assumption of jurisdiction to which the court has no legal claim, and the mere erroneous exercise of a jurisdiction with which it is invested. In the former case prohibition is the proper remedy, but in the latter the error can only be corrected by appellate proceeding.—STATE v. MALONE, Fla., 23 South. Rep. 575.

90. QUIETING TITLE—Mortgages.—One who forecloses a junior mortgage, and acquires the legal title, cannot assert a lien under a prior mortgage in an action to quiet title, based on the ownership acquired by said foreclosure.—FARM & COLONIZATION CO. v. MELOY, S. Dak., 75 N. W. Rep. 207.

91. QUIETING TITLE—Petition.—A petition to quiet title to land, under St. 1898, ch. 340, will be dismissed where the evidence shows there is only a mere apprehension that an adverse claim may be maintained, but no defect or irregularity in the title of petitioner can be pointed out.- GILMAN v. GILMAN, Mass., 50 N. E. Rep. 452.

92. RAILROAD COMPANY — Killing Stock. — Where a railroad company purchases a right of way across land, and covenants with the grantor not to fence its track across his land without his consent, which consent he refuses to give, and subsequently has stock killed on the track across his land, he cannot recover without showing negligence on the part of the company.—SAN ANTONIO & A. P. RY. CO. v. ADAMS, Tex., 45 S. W. Rep. 844.

93. RAILROAD COMPANY—Street-Car Companies.—The relation of common carrier and passenger exists between a street-railroad company and a passenger until he has reached his destination, and has had a reasonable opportunity to alight safely from the car; and the carrier, during this period, is bound to extraordinary diligence, on behalf of itself and its agents, to protect the life and person of the passenger.—ATLANTA CONSOL. ST. RY. CO. v. BATES, Ga., 30 S. E. Rep. 41.

94. RAILROAD COMPANY—Street Railroads—Care Required.—The obligation of carriers of passengers to exercise the highest degree of care which human prudence and foresight can suggest only exists with respect to those results which are naturally to be apprehended from unsafe roadbeds, defective machinery, imperfect cars, and other conditions endangering the success of the undertaking; but, in the operation of a street railway, such a carrier is required only to use that degree of skill and care which would be required of an ordinarily careful and prudent man.—STIERLE v. UNION RY. CO. OF NEW YORK CITY, N. Y., 50 N. E. Rep. 419.

95. RECEIVER—Insolvent Corporation.—A receiver of an insolvent national bank has a right to maintain a suit in his own name against directors to charge them for losses that may have been sustained by the corporation and its creditors through their wrongful or fraudulent acts.—COCKRILL v. ABELES, U. S. C. C. of App., Eighth Circuit, 86 Fed. Rep. 505.

96. RELEASE—Composition with Creditors.—A composition agreement entered into between creditors and their common debtor, whereby the former mutually agreed to release to the latter a part of their claims, upon payment of a certain other part, is a valid contract between each creditor and the debtor; and an offer by the debtor to pay one of the creditors the amount due him in accordance with the agreement, after all the others had received their *pro rata* part in full settlement of their claims, constitutes a legal tender of the debt due such creditor.—STEWART v. LANGSTON, Ga., 30 S. E. Rep. 35.

97. REMOVAL OF CAUSES — Remand. — The Circuit Court of the United States, to which a cause has been transferred or removed from a State court, is the sole judge as to whether the cause was properly removed or not, and its order remanding the case back to the State court is binding upon the parties, and should be respected by the State courts.—COEUR D'ALENE RY. & NAV. CO. v. SPALDING, Idaho, 53 Pac. Rep. 107.

98. REPLEVIN—Delivery Bond — Estoppel.—"By executing a redelivery bond in a replevin action, and procuring a return of the property thereunder, the defendant is estopped from denying his possession of the

property at the commencement of the action."—NYE v. WEISS, Kan., 53 Pac. Rep. 152.

99. RES JUDICATA — Motions.—As a general rule, the doctrine of *res judicata* is not applicable to motions, and the fact that in a contest between attachment and execution creditors it was assumed and held upon a motion that the execution had been levied upon the property will not preclude a party from showing in a later stage of the same proceeding that no levy was in fact made under the execution.—BANK OF SANTA FE v. HASKELL, Kan., 53 Pac. Rep. 182.

100. STATUTES — Retrospective Effect.—A statute changing the period of limitation will not be applied to antecedent transactions, unless its letter or necessary intent demand a retroactive construction.—WALKER v. BURGESS, W. Va., 30 S. E. Rep. 99.

101. SUBROGATION — Right of Replevin Bail.—Defendants, at the request of one who was interested in the payment of a judgment, although not a party thereto, became replevin bail for the stay of execution. Afterwards they were compelled by the judgment creditor to pay the judgment, which was assigned to them. Held, that they were entitled to be subrogated to the judgment creditor's rights, and to have execution issue for the amount of the judgment so paid.—DAVIS v. SCHLEMMER, Ind., 50 N. E. Rep. 373.

102. TRADE-MARK — Used by Two Firms in Different Countries.—Where a trade-mark is used by a manufacturer in England and also by a firm in the United States in which he is a partner, and its use began in both places at about the same time, and it came to identifying the article manufactured by the United States firm by use in its business for many years, and the English manufacturer retired from the United States firm; the right to use it passed to his successors as part of the business, and he will not be allowed to use it in this country in a separate business of the same sort.—BATCHELLER v. THOMSON, U. S. C. C., S. D. (N. Y.), 86 Fed. Rep. 630.

103. TRIAL — Finding by Court after Disagreement of Jury.—Where, in an action at law on a contract, in which the parties are entitled to a jury as a matter of right, both at common law and under Code Civ. Proc. § 250, the jury disagree and are discharged, it is error for the court, over objection of plaintiff, to make a finding of the facts and the law, and enter judgment accordingly, since section 269 provides that in case of mistrial the action may be again tried, immediately or at a future time, as the court may direct.—MURRAY v. HAUSER, Mont., 53 Pac. Rep. 99.

104. TROVER AND CONVERSION — Pleading and Proof.—In actions for damages for the conversion of personal property, the defendant, under a general denial, is not limited to counter evidence of the conversion charged, but may impeach the plaintiff's claim of title to the property as fraudulent or otherwise unfounded.—KERWOOD v. AYRES, Kan., 53 Pac. Rep. 134.

105. TRUSTS — Constructive and Resulting.—Where a principal ratifies his agent's acts in purchasing lands with the principal's money and taking the title in his own name, such ratification has the effect of a previous authorization thereof, and a constructive trust will not arise in favor of the principal; it being necessary to the creation of such a trust that the title be taken in the agent's or another's name without the principal's consent, or that the principal's money be fraudulently used.—LONG v. KING, Ala., 23 South. Rep. 534.

106. TRUSTS AND TRUSTEE — Fraud—Confidential Relations.—A donor is not presumed to have been actuated by undue influence exercised in a confidential relation from the mere fact that the donee in trust had formerly been employed by him as agent to transact certain special business relating to the subject of the trust, and is entitled to commission thereunder.—BROWN v. MERCANTILE TRUST & DEPOSIT CO., Md., 40 Atl. Rep. 256.

107. VENDOR AND PURCHASER—Bond for Title—Power of Sale.—Plaintiff sold land to defendant, and executed a bond for title on payment of the purchase-money notes; the bond containing a power of sale to plaintiff on non-payment of the notes,—to sell the land and apply the proceeds on the notes; and the notes, executed at the same time as the other instruments, recited that they were secured by bond of even date. Held, that defendant was bound by the power, though he did not sign the bond; it having been delivered to him, and he having accepted it.—BATTERY PARK BANK v. LOUGHRAN, N. Car., 30 S. E. Rep. 17.

108. VENDOR'S LIEN—Enforcement.—When suit is brought to enforce a vendor's lien, and sales have been made by the vendee of portions of the land against which the lien is sought to be enforced, and the plaintiff files an amended bill, making the purchasers of such portions parties defendant, but fails to set out in such amended bill the interests of such parties, and the dates of their respective purchases, by exhibiting copies of the conveyances to them, or otherwise, such amended bill is demurrable.—MCLAUGHLIN v. MCGRAW, W. Va., 30 S. E. Rep. 64.

109. VENDOR AND PURCHASER—Sale of Realty—Rescission of Contract.—Where a purchaser of real estate enters into possession under a conveyance with covenants of warranty, though the grantor has no title, if he has committed no fraud, and is not insolvent, and there is no other independent equity, the grantee is protected by the grantor's covenants of warranty, and a rescission of the contract will not be decreed.—FIELDS v. CLAYTON, Ala., 23 South. Rep. 530.

110. VENDOR AND PURCHASER—Title—Specific Performance.—The fact that a deed under which the vendor mediately derived title was not acknowledged or recorded until after the grantee's death is not such a cloud on the title as to constitute a defense to a suit for specific performance of the agreement to purchase, since delivery is presumed to have been made at the time of execution.—CONLEY v. FINN, Mass., 50 N. E. Rep. 460.

111. WATERS — Riparian Owners.—A riparian proprietor who, by act of a legislature, was vested with the title to land made by filling and extending his lots into a river, conveyed the entire water privileges below high-water mark. Held, that the grantee took an irrevocable license to fill and extend the lot from high-water line, with the right to hold such extensions as his own, but did not take title to extensions made prior to his conveyance.—JACOB TOME INST. OF PORT DEPOSIT v. CROTHERS, Md., 40 Atl. Rep. 261.

112. WILLS—Devisees—Income of Trust Fund.—Where the income of a fund invested in shares of a corporation is bequeathed to one for life, remainder over to another, the remainder-man is entitled to the actual value of the shares, including accumulated surplus or undivided earnings, at the time of testator's death, which forms a capital, the income of which, whether in the nature of dividends or otherwise, belongs to the life tenant from that time.—LANG'S EXR. v. LANG, N. J., 40 Atl. Rep. 278.

113. WILLS—Remainders—Executory Devise.—Under a devise of a life estate in trust for testator's daughter's with remainder to their issue living at their death, followed by a devise over to heirs and distributees of testator in case any of the children of said daughters should die under age without issue, each of said children takes a contingent remainder in fee, which becomes vested on the death of the mother, subject to be devested by his or her death under age, without issue.—GOODWIN v. BANKS, Md., 40 Atl. Rep. 268.

114. WILL OF UNMARRIED WOMAN—Revocation.—Under the laws of this State, the will of an unmarried woman, executed in 1884, was not *ipso facto* revoked by her subsequent marriage prior to April 5, 1891; but where such will purported to convey all of her property, and was not made in contemplation of a subsequent marriage, such subsequent marriage was, under our laws as they then existed, a total alteration of her circumstances, revoking the will.—COLCORD v. CONROY, Fla., 23 South. Rep. 561.